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In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,
Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Gulf Oil Corporation, Union Oil Company of California, Industrial Asphalt, Inc. and Edgington Oil Company pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases; Copp Paving Company, et al., Appellants, v. Gulf Oil Company, et al., Appellees,* No. 72-2152.

OPINIONS BELOW

The opinion of the Court of Appeals does not yet appear in the Federal Reporter but is reported in 1973-2 Trade Cases ¶ 74,732 and is set forth in Appendix B hereto. The opinion of the District Court is set out in Appendix A and is reported in 1972 Trade Cases ¶ 74,013.

All emphasis in quotations has been added unless otherwise stated.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1292(b). Its judgment was entered October 3, 1973.

The very questions at issue are whether the District Court had jurisdiction, which was invoked under Clayton Act § 4 (15 U.S.C. § 15) and 28 U.S.C. § 1337.

QUESTIONS PRESENTED

This case has to do with a commodity, asphaltic concrete—made in California in and around Los Angeles from California materials—sold and used in California in that area and by its nature incapable of being sold or used outside of the state or of being imported into California from without. Respondents, makers of the commodity in Los Angeles, sued petitioners, also located in California, claiming violation of the Robinson-Patman Act, Sections 3 and 7 of the Clayton Act, and Sections 1 and 2 of the Sherman Act. The District Court held that it lacked jurisdiction for want of the jurisdictional prerequisites of the several Acts relative to interstate commerce. The court below reversed solely upon the fact that asphaltic concrete is used as a topping for roads, some of which, although in California, are segments of interstate highways.

For that reason it held that the producers of the commodity are "instrumentalities" of interstate commerce and, proceeding from that premise, it held that the producers were "in commerce" so as to satisfy the requirements of the several Acts "as a matter of law," regardless of a finding of fact of no effect on commerce. All this it did in reliance on decisions under the quite different commerce provision of the Fair Labor Standards Act.

The questions are these:

1. With respect to a commodity which is not only made and sold in one state alone but is only salable and usable in that

state, does the fact that it is used in an instrumentality of commerce such as a highway supply the necessary requirements, by itself and as a matter of law

(a) Of the anti-discrimination clause of the Robinson-Patman Act that the discriminatory sale be by a "person engaged in commerce, in the course of such commerce," that "either or any of the purchases involved * * * [be] in commerce," and that the "effect * * * may be substantially to lessen competition or tend to create a monopoly in any line of commerce"?

(b) Of Section 3 of the Clayton Act that the tying conduct be that of a "person engaged in commerce, in the course of such commerce" and that "the effect * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce?

(c) Of Section 7 of the Clayton Act that the acquisition by a "corporation engaged in commerce" be of a corporation "engaged also in commerce," and that "the effect * * * may be substantially to lessen competition, or tend to create a monopoly", where the acquired corporation sold nothing in commerce and the product it made did not enter commerce?

(d) Of Sections 1 and 2 of the Sherman Act that the restraint or monopolization be "of trade or commerce among the several states or with foreign nations" where, factually, there is no effect on commerce?

2. Was it not error, forming a grossly misleading precedent, to substitute for the jurisdictional provisions of the Sherman, Clayton, and Robinson-Patman Acts the quite different jurisdictional provision of the Fair Labor Standards Act concerning "employees * * * engaged * * * in the production of goods for commerce"?

STATUTES INVOLVED

Title 28 U.S.C. § 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, as amended:

Section 1 (15 U.S.C. § 1):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *."

Section 2 (15 U.S.C. § 2):

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 730, as amended:

Section 1 (15 U.S.C. § 12):

"* * * 'Commerce', as used herein, means trade or commerce among the several States and with foreign nations * * *."

Section 3 (15 U.S.C. § 14):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities * * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 4 (15 U.S.C. § 15):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 7 (15 U.S.C. § 18):

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital**** of any other corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.****"

Robinson-Patman Act, Section 2(a), Act of June 19, 1936, c. 592, 49 Stat. 1526, 15 U.S.C. § 13(a):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce* * * * when the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce* * * *"

Not involved in this case is the *Fair Labor Standards Act* (Act of June 25, 1938, c. 636, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201, et seq.), but because the court below rested on it by analogy we quote pertinent provisions:

Section 6(a), (29 U.S.C. § 6(a)):

"Every employer shall pay to each of his employees who in any week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:* * * *"

STATEMENT OF THE CASE

A. Basic Facts[1]

Respondents (hereafter sometimes called "Copp") are Los Angeles merchants of asphaltic concrete, a substance used as a topping for streets, roads and driveways. Copp sued petitioners for treble damages, claiming violation of

> Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2),
> Section 2(a) of the Robinson-Patman Act (15 U.S.C. § 13 (a)), and
> Sections 3 and 7 of the Clayton Act (15 U.S.C. §§ 14, 18),

all in the marketing of asphaltic concrete in California in and around Los Angeles. (App. A, pp. 1-3).

Asphaltic concrete is manufactured at facilities known as "hot plants" by combining rock, sand, and other aggregates with a small amount of liquid petroleum asphalt. The *fundamental* fact is that asphaltic concrete must be delivered hot and is of great weight and low value; therefore it can only be sold within 30 or 35 miles of the place of manufacture. Copp's plant was in suburban Los Angeles and competed with other Los Angeles hot plant operators, among them petitioner Industrial Asphalt, Inc. No hot plant in the Los Angeles area delivered or could deliver asphaltic concrete outside California. All such plants manufactured their product from aggregates mined at local pits and liquid asphalt manufactured at Los Angeles refineries (App. A, pp. 1-3). Thus, as the District Court observed (App. A, p. 3):

> "The jurisdictional problem arises out of the fact that plaintiffs and plaintiffs' competitors manufacture a product out of California raw materials for sale and delivery in California.
>
> * * *
>
> "* * * asphaltic concrete does not move in interstate commerce except under exceptional circumstances, none of which are present here."

1. The facts are taken from the opinions below and are uncontradicted.

Petitioners Gulf Oil Corporation ("Gulf"), Union Oil Company of California ("Union"), and Edgington Oil Company ("Edgington") produced liquid petroleum asphalt, but they did not make or sell asphaltic concrete (App. B, pp. 9-10).

B. The proceedings in the District Court

Perceiving a basic jurisdictional issue on the threshold, the District Court directed that discovery be addressed to that issue at once.

After discovery had disclosed all relevant facts and Copp had had full opportunity to develop them, Copp was directed by the court to point to some evidence of jurisdiction (App. A, p. 2). Its showing rested on the fact that some of the streets and roads in California in the 35 mile radius around Los Angeles are segments in the interstate highway system, plus a stipulation that the quantity of asphaltic concrete used in those roads and streets was not *de minimis* (App. A, p. 3). On these facts Copp offered the bare argument that "the use of asphaltic concrete in the interstate highway puts it 'in commerce' " (App. A, pp. 3, 4). The District Court rejected this argument. No other jurisdictional theory being urged or supported, the court entered an order of partial summary judgment in favor of petitioners under F.R.Civ.P. Rule 56(b) (App. A, pp. 7-8). Thereby it eliminated the asphaltic concrete claims for lack of jurisdiction.[2]

2. Final judgment was not entered because the complaint also alleged antitrust violation in the marketing of liquid petroleum asphalt (App. A, pp. 1-2). Because liquid asphalt, as distinguished from asphaltic concrete, is sold in interstate commerce, the court's order did not dispose of that claim but left it for further proceedings (App. A, pp. 7-8). In addition to the four petitioners, there was a fifth defendant, Sully-Miller Contracting Company, another Los Angeles hot plant operator which competed with Copp in the local asphaltic concrete trade. As Sully-Miller did not make or sell liquid asphalt (App. A, pp. 5-7), the District Court's ruling on the asphaltic concrete claims was a disposition of the entire case as to Sully-Miller, and summary judgment in its favor was granted. (App. A, p. 7.) The court below held that:

> "The question of the summary judgment in favor of the defendant Sully-Miller is reserved, as it was not properly before this court under Fed.R. Civ. P. 54(b)." (App. B, p. 14).

Consequently, Sully-Miller is not a petitioner here, although this Court's disposition of the case will directly affect it.

C. Proceedings in the court below

Respondents were allowed an interlocutory appeal to the court below under 28 U.S.C. § 1292(b). That court reversed the order of partial summary judgment (App. B, p. 15), saying:

> "We hold that the production of asphalt for use in interstate highways rendered the producers thereof 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law." (App. B, p. 10).

In short, although asphaltic concrete in the Los Angeles area can be made solely in California from California materials, is and can be sold and used only in California, and cannot be sold or used outside that state, nevertheless the court below held that there was jurisdiction of claims of (1) price discrimination in violation of the Robinson-Patman Act, (2) tying arrangements in violation of Section 3 of the Clayton Act, (3) restraints of trade and monopolization in violation of Sections 1 and 2 of the Sherman Act, and (4) violation of Section 7 of the Clayton Act by Union's acquisition of Sully-Miller. And it held all this solely because California roads and streets in which the asphaltic concrete is used are segments of a highway system that is interstate.

For this holding the court relied upon the supposed analogy of decisions under the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq., which prescribes that minimum wages be paid to persons employed "in commerce or in the production of goods for commerce" or "in an enterprise engaged in commerce or in the production of goods for commerce," 29 U.S.C. §§ 203(s), 206(a), (b). (App. B, pp. 13-15).

REASONS FOR GRANTING THE WRIT

A writ is called for, just as in *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972), where this Court reviewed a decision of the court below which, as here, reversed an order of a district court in an antitrust case on an interlocutory appeal under 28 U.S.C. § 1292(b).

The questions presented are fundamental, not only to the further conduct of this case,[3] but to the administration of the antitrust laws generally. The decision below is a new creation, immeasurably expanding the reach of all federal antitrust laws by substituting for the jurisdictional requisites prescribed by Congress the different jurisdictional elements prescribed in a wholly different Act having different purposes, the Fair Labor Standards Act. The decision is inconsistent with the rationale of this Court's decisions, e.g., *United States v. Yellow Cab Company*, 332 U.S. 219 (1947) and *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941), and it is in direct conflict with decisions of other circuits, viz.:

Fifth Circuit:

Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co., 469 F.2d 416 (1972);

Littlejohn v. Shell Oil Company, 483 F.2d 1140 (1973, *en banc*);

Sixth Circuit:

Willard Dairy Co. v. National Dairy Prods. Co., 309 F.2d 943 (1962), *cert den.* 373 U.S. 934 (1963);

Seventh Circuit:

Mayer Paving and Asphalt Co. v. General Dynamics Corp., ... F.2d ....., 1973-2 Trade Cases ¶ 74,719 (Oct. 1, 1973);

Borden Co. v. Federal Trade Commission, 339 F.2d 953 (1964);

Tenth Circuit:

Belliston v. Texaco, Inc., 455 F.2d 175 (10 Cir.), *cert. den.*, 408 U.S. 928 (1972).

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3. In *Land v. Dollar*, 330 U.S. 731 (1947), this Court stated (p. 734, n. 2):

> "Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case,' *United States v. General Motors Corp.*, 323 U.S. 373, 377."

The court below acknowledged conflict with *Littlejohn, supra,* a case where the Fifth Circuit granted a hearing *en banc* after decision by a panel and reversed the panel; a petition for writ of certiorari was filed in *Littlejohn* on October 19, 1973 (No. 73-688). In *Mayer Paving,* a petition was filed October 23, 1973 (No. 73-671).

A. The Robinson-Patman and Clayton Act Claims

1. The Robinson-Patman claims of price discrimination

The Robinson-Patman claims are that petitioner Industrial Asphalt (and Sully-Miller) sold asphaltic concrete at discriminatory prices (App. A, p. 2). But all such sales, whether by plaintiffs or defendants, occurred in California and were sales of California produced materials (App. A, p. 3; App. B, pp. 9-10).

Jurisdiction under the Robinson-Patman Act is narrower than under the Sherman Act. The Act not only requires that the effect of the alleged discrimination may be to substantially lessen competition or tend to create monopoly in any "line of commerce," but it requires that the act of discrimination must be by a person "engaged in commerce, in the course of such commerce * * * where either or any of the purchases involved in such discrimination are in commerce" (15 U.S.C. § 13(a)).

The Robinson-Patman Act plainly requires that at least some of the sales complained of cross state lines. E.g., *Standard Oil Co. v. Federal Trade Commission,* 340 U.S. 231, 236-238 (1951); *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115, 118-120 (1954). The plain meaning of the statutory language is found in the statement of Congressman Utterback, quoted with approval in *Moore v. Mead's Fine Bread, supra,* 348 U.S. at 120. Said he:

> "Where, however, a manufacturer sells to customers *both within the State and beyond the State,* he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade."[4]

In *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Company,* 469 F.2d 416 (5 Cir. 1972), the court observed that the "failure of any party to have any interestate business disposes of the Clayton and Robinson-Patman Act claims," 469 F.2d at 418. The same court, sitting *en banc* in *Littlejohn v. Shell Oil Company,* 483 F.2d 1140, 1144, referred to at least one interstate sale as the "sine qua non" of Robinson-Patman jurisdiction. To the same effect is *Belliston v. Texaco, Inc.,* 455 F.2d 175 (10 Cir.), *cert. den.,* 408 U.S. 928 (1972):

> "All of the discriminatory sales took place in the Salt Lake City area * * * 'the Robinson-Patman Act is applicable only where the alleged discriminatory transaction took place in interstate commerce. That is . . . at least one of the two transactions which, when compared, generate a discrimination must cross a state line.'" 455 F.2d at 178, citations omitted.

So also *Willard Dairy Corp. v. National Dairy Prods. Corp.,* 309 F.2d 943, *cert. den.* 373 U.S. 934 (1963):

> "[Price discrimination] is the area of competition and sales in and around the City of Marion, Ohio [involved] purely intrastate transactions, not interstate in character, as is necessary to impose liability under the Robinson-Patman Act." 309 F.2d at 946.

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4. Rowe, Price Discrimination Under the Robinson-Patman Act, pp. 77-83 states, with citation:

> "Courts apply Sherman Act proscriptions to restrictive or monopolistic business activities wherever they occur, so long as interstate commerce is 'affected.' On the other hand, the price discrimination clauses of Robinson-Patman require that the discriminator be 'engaged in commerce,' that the challenged discrimination occur 'in the course of such commerce,' and that 'either or any of the purchases involved in such discrimination are in commerce . . .' Any broader interstate commerce reach of Robinson-Patman is refuted by its legislative history, for the Senate-House Conference struck a clause in the House bill which would have adopted the 'effect on commerce' criterion."

In accord are *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 37 (5 Cir.), *cert. den.*, 409 U.S. 1077 (1972) (same language as *Belliston, supra*); *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, ... F.2d ....., 1973-2 Trade Cases ¶ 74,719 (7 Cir. 1973); *Borden Co. v. Federal Trade Commission*, 339 F.2d 953 (7 Cir. 1964).

The court below dismissed all this settled law by calling it a mere "state line test" and holding it to be sufficient that asphaltic concrete "is itself closely linked to an instrumentality of interstate commerce". (App. B, pp. 14-15.) But the court was aware that Robinson-Patman requires that the alleged discriminatory sale be by a person "engaged in commerce, in the course of such commerce * * * where either or any of the purchases involved in such discrimination are in commerce". Therefore it had to translate the notion of "instrumentality of commerce" into "in commerce", because neither respondents nor petitioner Industrial made any sales in the course of commerce, and none of the purchases is "in commerce". The process used to effect this translation consisted of two steps: (1) to say that the asphaltic concrete came to be incorporated in physical objects—roads—which, though local, are used by commerce, and (2) to proceed from this to the conclusion that both the parties and the sales are "in commerce." Whatever may be said of step 1, step 2 is a rank fallacy. It finds no support whatever even in the cases under the Fair Labor Standards Act cited by the court below. In *Overstreet v. North Shore Corporation*, 318 U.S. 125 (1943), this Court held that workers engaged in repairing interstate roads were "engaged in commerce." But the Robinson-Patman claims do not and cannot involve repair of roads; they involve only the sale of a commodity to those repairing or making roads.[5] That situation

5. Construction of a section of pavement would not be the sale of a commodity and would therefore not come within the Act. *General Shale Products Co. v. Struck Const. Co.*, 132 F.2d 425 (6 Cir. 1942), *cert. den.*, 318 U.S. 780 (1943).

was before this Court in *Alstate Construction v. Durkin*, 345 U.S. 13 (1953). There, over a dissent of Justices Douglas and Frankfurter,[6] and relying on the legislative history of the Fair Labor Standards Act, the Court held that the employee was engaged, *not* "in commerce," but in the "production of goods for commerce." Unlike the Fair Labor Standards Act, the Robinson-Patman offers no alternative to "in commerce"; it permits no fall-back to "production of goods for commerce." The leap by the court below from the analogy of "in production of goods for commerce" is simply unwarranted.

Indeed, there is no basis for looking to the Fair Labor Standards Act at all, even for the first step. That is precisely the course which this Court rejected in *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941). There the Federal Trade Commission sought to extend the authority granted by Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) to local affairs by analogy to the authority accorded the Interstate Commerce Commission in the *Shreveport* case.[7] The invitation to "thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom and control" was declined, this Court observing that "translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business." 312 U.S. at 353-55.

The court below recognized that its decision is in conflict with *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 (5 Cir. 1973) but

6. "The Court reasons that if the man who is building or repairing an interstate highway is 'engaged in commerce,' the one who carries cement and gravel to him from a nearby pit is 'engaged in the production of goods for commerce.' Yet if that is true, how about the men who produce the tools for those who carry the cement and gravel or those who furnish the materials to make the tools used in producing the cement and gravel? Each would be essential to the highway worker 'engaged in commerce.' Yet the circle gets amazingly large once we say that 'the production of goods for commerce' includes the 'production of goods for those engaged in commerce.'" (345 U.S. at 17).

7. *Houston, E. & W. Ry. v. United States*, 234 U.S. 342 (1914).

appeared to believe that case distinguishable as involving gasoline; that, it thought, was not so "closely linked" to interstate commerce (App. B, p. 14). One would think that gasoline entering tanks in automobiles crossing state lines would be more "closely linked" to interstate commerce than a piece of asphaltic real estate forever affixed to the locality. Be that as it may, the conflict between the present case and *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 1973-2 Trade Cases ¶ 74,719 (7 Cir.) cannot be so phrased away. In the *Mayer* case, plaintiff was a local asphaltic concrete producer and paving contractor seeking treble damages on purchases of crushed aggregates which it used in both paving and the manufacture of asphaltic concrete. (Petition for Certiorari in this Court in No. 73-671, pp. 4, 7). The Seventh Circuit affirmed a judgment directed for defendants because all the relevant sales occurred in Illinois. .... F.2d ...., 1973-2 Trade Cases ¶ 74,719. In that case, Mr. Justice Tom C. Clark, sitting by designation, dissented,[8] but even his opinion recognized that a complete lack of interstate sales is fatal to a Robinson-Patman claim. Said he (1973-2 Trade Cases at p. 95,166):

> "In [*Borden Co. v. Federal Trade Commision, supra*] the Federal Trade Commission indulged itself in a *non sequitur*, i.e., that since Borden was engaged in interstate commerce, it necessarily followed that all of its products were in interstate commerce. This Circuit, I submit, correctly held that Borden's being in interstate commerce was not enough; 'it must also be shown that the sale complained of was one occurring in interstate commerce.' 339 F.2d 953, 955. In *Borden*, there was a complete absence of interstate sales from any of its plants in Ohio and no connection whatever between its local sales in Ohio and its interstate sales."

8. The basis of Mr. Justice Clark's dissent was that the defendant shipped large quantities of crushed limestone from Illinois at discriminatory prices to asphalt manufacturers and paving contractors in Indiana as well as Illinois (1973-2 Trade cases at p. 95,166). No facts similar to that are present here.

The decision below concerning Robinson-Patman is, we submit, wholly untenable.

2. The Section 3 Clayton Act claims of tie-in or exclusive dealing

Invoking Clayton Act § 3 (15 U.S.C. § 14), Copp claimed that Industrial Asphalt (and Sully-Miller) sold asphaltic concrete pursuant to "unlawful extraction from customers of agreements not to use or deal in plaintiffs' products or services". Plaintiffs' products and services were and could be sold and used only in California in and around Los Angeles (App. A, pp. 2-3).

Clayton Act, § 3 has the identical requirement of *effect* as Robinson-Patman. Additionally, it requires that the conduct be by a "person engaged in commerce, in the course of such commerce". The court below upheld jurisdiction on the same ground as it upheld jurisdiction of the Robinson-Patman claim (App. B, pp. 13-14), and its decisions fails for the same reason.

The holding is in direct conflict with *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416, at 418. There the court held that the lack of any interstate sales "disposes of the Clayton Act * * * claims."

The case where this Court addressed itself to the jurisdictional provisions of Section 3 is *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1947). That case involved a vast program of exclusive dealing arrangements imposed throughout seven western states. Dealers in states outside California, buying products shipped to them from California, and California dealers, buying some products shipped to them from without the state (p. 314), were bound by the exclusive dealing contracts, so that the requirements of a "person engaged in commerce, in the course of such commerce" were obviously present, and the case turned on "effect", as to which the Court said (337 U.S. at 314-5):

> "But the effect of appellant's requirements contracts with California retail dealers is to prevent them from dealing with suppliers from outside the State as well as within the State and is thus to lessen competition in both interstate and

> intrastate commerce. Appellant has not suggested that if these dealers were not bound by their contracts with it they would continue to purchase only products originating within the State."

The import of this statement is clear: the Act is not violated unless the commodities subject to the arrangement move in interstate commerce or the arrangements preclude the making of interstate sales. In the instant case, however, interstate commerce in asphaltic concrete made in and around Los Angeles does not and cannot exist.

3. The Section 7 Clayton Act acquisition claim.

Copp charged violation of Section 7 of the Clayton Act (15 U.S.C. § 18) by petitioner Union's acquisition of the capital stock of defendant Sully-Miller, a manufacturer and seller of asphaltic concrete, doing no interstate business of any kind (App. A, p. 7).[9] Nevertheless, the court below rested jurisdiction on the same basis employed with respect to the Robinson-Patman and Section 3 Clayton Act claims (App. B, pp. 14-15).[10]

In addition to an "effect" similar to the requirement of Section 3 and Robinson-Patman, it is a jurisdictional requirement of Section 7 that the acquired corporation be "a corporation engaged also in commerce."

Since Sully-Miller was not "in commerce," the court below read this requirement out of the Act. It did so by turning to *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953) for its

9. Copp also claimed that petitioner Gulf's acquisition of petitioner Industrial Asphalt violated Section 7 (App. A, p. 2; App. B, p. 10). The District Court did not eliminate that claim from the case (App. A, p. 7), presumably because Industrial is also a marketer of liquid asphalt, which, unlike asphaltic concrete, is exported from California to other states.

10. Whether and in what circumstances a private party can base a suit for damages upon an acquisition violative of Section 7 of the Clayton Act is an open question some day requiring settlement by this Court. It cannot be raised now, because it was not passed upon by either court below.

holding that an employee was "engaged in production of goods for commerce" where the goods entered into an instrumentality of commerce, by then recasting that holding into one that the employee was "engaged in commerce," and then recasting that holding once again into one that the employer was "a corporation engaged in commerce." If this chain of reasoning is not spelled out, it is implicit. But this Court in *Alstate* did not equate the concept of an employee "engaged in commerce" with the concept of one "engaged in the production of goods for commerce," and in *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), it had expressly drawn a distinction between a corporation not being in commerce and its employees being in commerce.

As for the requirement that the activity complained of have the effect of substantially lessening competition or tending to create a monopoly in "a line of [interstate] commerce," the court below regarded any invocation of that provision as going only to the merits of respondents' claims (App. B, p. 15). But there was no issue of fact on this element. Assuming that the acquisition of Sully-Miller affected competition, it was not in "a line of [interstate] commerce". In this case the only conceivable lines of interstate commerce were the exportation from California of liquid asphalt, as distinguished from asphaltic concrete, and a hypothesized interstate commerce in the use of local roads. But the liquid asphalt claims were left in the case by the District Court, the acquisition by Sully-Miller had nothing to do with interstate commerce in liquid asphalt (App. A., p. 6), and the District Court found no evidence to support any conclusion that the acquisition of Sully-Miller affected the use of roads (App. A, p. 6).

B. The Sherman Act claims

The complaint also charged price fixing and monopolization in the sale and marketing of asphaltic concrete in violation of

Section 1 of the Sherman Act, which proscribes "restraint(s) of trade or commerce among the several states", and of Section 2, which relates to the monopolization of "any part of the trade or commerce among the several states". (App. A, p. 1).

The jurisdictional test of the Sherman Act is broader than that of the Robinson-Patman or Clayton Acts, as the offenses described include local restraints of trade having an impact upon interstate commerce. But that very provision is also a limitation: if there is no such effect, the Act cannot apply and jurisdiction is lacking. The District Court was aware of the reach of the Sherman Act, fully considered it, and found the facts necessary to its application lacking. It found that interstate commerce was neither *restrained* nor *affected* by the activities of which respondents complain. There can be no criticism of that finding,[11] and the Court of Appeals did not differ as to the facts. Instead, it cast a new rule under which the facts are irrelevant as a "matter of law".

In *United States v. Yellow Cab Company*, 332 U.S. 219, 230-34 (1947), this Court focused attention on the nature and scope of the trade and commerce allegedly restrained. Holding that a restraint on transportation of passengers and their luggage between railroad stations in Chicago on an interstate journey was a restraint on interstate commerce, it held that a restraint on the service of taxicabs in conveying interstate passengers between their homes and railroad stations was not.

Another panel of the court below had previously acutely observed, in *Page v. Work*, 299 F.2d 323, 330 (9 Cir.), *cert. den.*, 368 U.S. 875 (1961), that

11. The District Court not only found that no issue of fact on the subject existed, but it was passing on a jurisdictional question. As said in *Rosemound Sand and Gravel Company v. Lambert Sand and Gravel Company*, 469 F.2d 416, 418 (5 Cir. 1972), "questions of jurisdiction are properly within the ambit of the court's authority."

> "The test of jurisdiction [under the Sherman Act] is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business."

Here, as in the Robinson-Patman and Clayton Act claims, the vice in the decision of the Court below is that it not only adopts jurisdictional concepts developed with reference to the language and purpose of the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq., described at pp. 8, 12, 13 above, but then leaps beyond them. It starts by reference to a statement found in decisions that by the Sherman Act Congress exercised all the constitutional power it possesses under the Commerce clause. Therefore, so its reasoning runs, the language Congress in fact chose to use may be ignored, and it is only necessary to ask whether Congress could have reached the particular matters had it wished, and then to see whether, by some other Act aimed at other matters and designed for other purposes, Congress did reach something thought to be similar. By this astonishing procedure, the jurisdictional reach of the Sherman Act is henceforth to be tested by *any other* Act whatever that Congress has enacted under the commerce clause. To be sure, the statement may be found in decisions that by the Sherman Act Congress exercised all its power, but those statements were made relative to the purpose of reaching and the power to reach "effects" on commerce of local restraints. Thus in *Apex Hosiery Co. v. Leader*, 310 U.S. 460, 495 (1940), the Court, limiting the reach of the Sherman Act, said:

> "Because many forms of restraint upon commercial competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act, 21 Cong. Rec. 2456. It was in this sense of preventing restraints on commercial competition that Congress exercised 'all the power it possessed.' "

In the Fair Labor Standards Act, Congress *chose* to assert its authority concerning employees simply by reference to the char-

acter of the employees' activities, not by reference to the effect on commerce. *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943). By contrast, by the Sherman Act Congress chose to exercise its authority by reference to the *effect of the conduct* on commerce. Consequently, the nature of the offenses described by the Sherman Act necessitates judicial inquiry about the effect upon commerce of the alleged conduct. Under the Fair Labor Standards Act, similar judicial inquiry is unnecessary, because Congress itself made extensive findings as to the effect upon commerce of substandard wages and working conditions. It found (29 U.S.C. § 202(a)):

> "(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

"A Congressional determination that particular activities affect commerce receives deference in the courts," as the opinion below itself observes. Upon *that* basis, Congress in the Fair Labor Standards Act delegated to the courts the task of doing no more than to consider whether a given occupation has a connection with commerce sufficient to meet the intendment of the minimum wage law. But the findings Congress made were relative to wages. It made no findings in the Sherman Act.

Indeed, the Fair Labor Standards Act in many instances eliminates the need for even the limited judicial inquiry noted above.

For example, Section 6(a) of the Act (29 U.S.C. § 206(a)) prescribes the minimum wages payable to persons "employed in an enterprise engaged in commerce or in the production of goods for commerce," and this term is defined at great length in Section 3(s) (29 U.S.C. § 203(s)). Among the enterprises so defined are local trolley and motor bus carriers (29 U.S.C. § 203(s)(2)). Yet that definition, if imported into the Sherman Act, would reverse *United States v. Yellow Cab Company*, 312 U.S. 219, 230-234 (1947). And, as noted above, *Federal Trade Commission v. Bunte Brothers*, 312 U.S. 349 (1941) shows the error of looking to the Fair Labor Standards Act at all.

Not only was it erroneous to look to the Fair Labor Standards Act, but the court below then leaped beyond that Act. In *Alstate Constr. Co. v. Durkin*, 345 U.S. 13 (1953), relied on below, the Court concluded that, for the purpose of the Fair Labor Standards Act, the term "production of goods for commerce" in that Act was not limited to "production of goods for transportation in commerce" because "[s]uch limiting language did appear in the bill as it passed the Senate, but Congress left it out of the bill as passed." (345 U.S. at 15.) In the present case, where neither set of words appears in the Sherman Act, the court below first holds that sale of goods used in an interstate highway is sale of goods for commerce. Then it superimposes on that idea a conclusion that a restraint on such a local sale must be deemed, as a matter of law, to have a direct and substantial effect on interstate commerce.

Labeling sections of Los Angeles roads as "arteries" or "instrumentalities" of commerce cannot supplant the District Court's finding that there was no evidence that interstate commerce using or depending upon those roads was restrained or affected (App. A, p. 6). The court below cited *City of Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871 (5 Cir.), *cert. den.* 379 U.S. 900 (1964) as expressing the same theory about instrumentalities

of commerce, but there the finding of federal jurisdiction was based co-equally on the fact that all the liquid asphalt used to produce asphaltic concrete had been imported from Venezuela. *United States v. South Florida Asphalt Co.*, 329 F.2d 860 (5 Cir. 1964), and *Hardrives Co. v. East Coast Asphalt Corp.*, 329 F.2d 868 (5 Cir. 1964) were cases companion to the *Lauderdale* case, decided by the same court on the same day but rested solely on the fact of importation. The *Fort Lauderdale* case has never been followed until the decision below. Moreover, its reasoning has been rejected by the very same court (the Fifth Circuit) in *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416 (5 Cir. 1973). There plaintiffs charged Sherman, Robinson-Patman and Clayton Act violations in the intrastate marketing of aggregates, *i.e.*, the very raw materials of which asphaltic concrete is largely composed. Affirming dismissal of the complaint for want of federal jurisdiction, the court stated that "if a combination could be shown to have existed here, its only purpose and effect would have been to interfere with the intrastate Louisiana sand and gravel business." 469 F.2d at 419. Footnote 1 of that opinion brings to the fore the plain conflict between that decision and the one below, the court there stating:

> "The facts which Rosemound claimed constituted a sufficient connection with the interstate commerce were that *** the sand and gravel sold by the defendants to Rosemound's expected customer were made into concrete 'mattresses' floated down the Mississippi, and placed on its bed; and that defendants sold sand and gravel to Louisiana contractors for the construction of highways. Despite these attempts to establish a nexus with interstate commerce, it was still uncontroverted that all sales of sand and gravel were made in Louisiana for Louisiana projects."

The decision below is in direct conflict with *Rosemound*.

CONCLUSION

The cause of federal antitrust enforcement is not forwarded by converting local squabbles into federal cases. We respectfully submit that the petition should be granted.

Dated: San Francisco, California, December 27, 1973.

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(Appendix Follows)

Appendix A

Original Filed May 31 1972
Clerk, U.S. Dist. Court San Francisco

United States District Court
Northern District of California
Master File
No. 50173-RES
No. C-71-608-RES

In Re Coordinated Pretrial Proceedings
In Western Liquid Asphalt Cases

This Document Relates to:

Copp Paving Company, Inc., et al., *Plaintiffs,*

v.

Gulf Oil Corporation, et al., *Defendants.*

ORDER

This is one of the Western Liquid Asphalt cases.[1] Plaintiffs seek damages and injunctive relief for antitrust law violations alleged to have been committed by the defendants in the sale and marketing of liquid asphalt and asphaltic concrete. The complaint alleges in a first claim:

1. Price fixing and a monopoly in the sale and marketing of liquid asphalt and asphaltic concrete. 15 U.S.C. §§ 1 and 2.

1. Pursuant to 28 U.S.C. § 1407 the cases were transferred to the United States District Court for the Northern District of California for coordinated or consolidated pretrial proceedings. *See In re Western Liquid Asphalt,* 303 F.Supp. 1053 (J.P.M.L. 1969); *In re Western Liquid Asphalt,* 309 F.Supp. 157 (J.P.M.L. 1970).

2. Discrimination against plaintiffs by reason of price and credit concessions to some customers and sales to plaintiffs' competitors at unreasonably low prices. 15 U.S.C. § 13 (a).

3. Unlawful exaction from customers of agreements not to use or deal in plaintiffs' products and services. 15 U.S.C. § 14.

4. Acquisition of stock, lessening competition and tending to create a monopoly. 15 U.S.C. § 18.

The second claim is substantially similar to the first except that it charges the violations under the California Cartwright Act (California Business and Professions Code § 16720).

Defendants by a series of motions seek to eliminate from this case the issues which are not common to the remainder of the Western Liquid Asphalt litigation. The court has heretofore stayed the discovery particular to this case and has ordered discovery to disclose the court's subject matter jurisdiction as to the asphaltic concrete issues.

I have assumed for the purposes of this order that the plaintiffs have proved all that they could as to the interstate character of their claim. In December 1971 it appeared to the court that there were potential jurisdictional problems which should be decided prior to the large-scale discovery on the merits which the plaintiffs proposed. The court ordered that discovery be directed to the jurisdictional problems, and plaintiffs made no request to enlarge the time allowed for that discovery. While in this day of notice pleadings and liberal discovery a plaintiff may initiate a case with no more than hope that his discovery will unearth something, I have acted on the premise that before parties should be required to submit to a burdensome discovery on the merits the facts supporting the jurisdiction of the court should be disclosed.

Liquid asphalt is a by-product of the refining of petroleum. It is extensively used in connection with the construction and

repairing of road and highway and other surfaces. Liquid asphalt does move in interstate commerce.

Asphaltic concrete is made by combining aggregates, fillers, and hot liquid asphalt in a hot plant operated at temperatures of approximately 375°F. The asphaltic concrete is discharged into a dump truck and delivered to the job, where it is placed at a temperature of about 275°F.

The traffic in asphaltic concrete is essentially local. The requirement that it be delivered hot plus the high costs of transportation as compared to the value of the product require that a hot plant serve a relatively restricted area. In this case plaintiffs' business was confined to an area near Los Angeles with a radius of 30 to 35 miles. None of the plants in competition with the plaintiffs delivered out of California. A more than de minimus quantity of the asphaltic concrete delivered by plaintiffs and their competitors is delivered for use on interstate highways.

While liquid asphalt moves in interstate commerce, the liquid asphalt used by plaintiffs and their competitors all comes from the State of California, which is an exporter of liquid asphalt. The aggregate used likewise are produced in California. The jurisdictional problem arises out of the fact that plaintiffs and plaintiffs' competitors manufacture a product out of California raw materials for sale and delivery in California.

The jurisdictional problem must be solved by examining the facts under the "in commerce" and the "affecting commerce" theories. *Yellow Cab Company of Nevada v. C. A. Christmas, et al.*, No. 25,567 (9th Cir. Mar. 1, 1972).

As indicated, asphaltic concrete does not move in interstate commerce except under exceptional circumstances, none of which are present here. Hence none of the acts charged to the defendants affect in any way the interstate movement of asphaltic concrete. Plaintiffs contend, however, that the use of the asphaltic concrete in the interstate highways puts it "in commerce" within

the meaning of the Sherman Act. Plaintiffs point to the authorizing language in the Federal-Aid Highway Act (23 U.S.C. § 101(b)) which expressly relates the interstate highways to interstate commerce, to 23 U.S.C. § 113, which expressly subjects interstate projects to the terms of the Davis-Bacon Act (40 U.S.C.A.§§ 276(a) *et seq.*), to *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943) holding that vehicular roads are instrumentalities of interstate commerce and that persons repairing them are "engaged in commerce" within the scope of the Fair Labor Standards Act (29 U.S.C. §§ 201 *et seq.*), and to *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953), holding that persons locally employed producing amesite for local use in an interstate highway are engaged in the "production of goods for commerce" and for that reason are protected by Section 7(a) of the Fair Labor Standards Act (29 U.S.C.A. § 207(a)). The conclusion which plaintiffs draw from these authorities is that since interstate highways are in commerce parties supplying materials for the repair and construction of them are likewise in commerce and that there is jurisdiction under the Sherman Act.

Word meanings found in one legally regulated area may[2] or may not[3] be useful in determining the word meanings to be used in another. The Sherman Act forbids conspiracies "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. In providing guidelines for the interpretation of the Act courts have used the terms "in commerce" and "affecting commerce."

Both the language[4] of the decisions under the Sherman Act and the results reached by them indicate that the words "in commerce" are used in connection with local acts which do in fact affect in any degree the flow of interstate commerce. Thus in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the defendant's acts were designed to shut down a radio station doing an interstate business. In *United States v. Bensinger Company*, 430 F.2d 584 (8th Cir. 1970), the defendant conspired to fix the price of a single dishwasher which was itself in interstate commerce. In *Las Vegas Merchant Plumbers Ass'n v. United States, supra*, the evidence showed that as a result of the alleged conspiracy plumbers refused to work for a foreign plumber using imported fixtures.

On the other hand if the local act, though done in a business which is in interstate commerce, does not affect the flow of such commerce, then the "in commerce" theory is not satisfied. Thus in *Yellow Cab Company of Nevada v. C. A. Christmas, supra*, the court quoted with approval from *Page v. Work, supra*, as follows:

> The record is clear that appellee newspapers and Consolidated were engaged in interstate commerce by virtue of (1) their regular purchases of newsprint and other supplies from sources outside of California; (2) the dissemination of national news; (3) their carrying of national advertising; and (4) a few-out-of-state subscribers.[5]

Yet, since the conspiracy related solely to local advertising, the court held that the defendant's activities did not affect the flow of commerce. I conclude that the plaintiffs' position cannot be maintained on the "in commerce" theory.

The question—Did the defendants' local activities substantially affect commerce?—remains.

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2. *Overstreet v. North Shore Corp., supra.*

3. *Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. 349 (1941).

4. *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1954), *rehearing denied*, 348 U.S. 889 (1954); *Page v. Work*, 290 F.2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961); and *Yellow Cab Co. of Nevada v. C. A. Christmas, supra.*

5. It is noted that these activities are sufficient to put a newspaper in interstate commerce for the purpose of the National Labor Relations Act (*Associated Press v. N.L.R.B.*, 301 U.S. 103 (1937)), and the Fair Labor Standards Act (*Sun Publishing Co. v. Walling*, 140 F.2d 445 (6th Cir. 1944), and *McComb v. Dessau*, 89 F. Supp. 295 (S.D. Cal. 1950)).

Plaintiff Ernest Copp's affidavit is to the effect that Sully-Miller Contracting Company (Sully-Miller), a subsidiary of Union Oil Company of California (Union), and Industrial Asphalt, Inc., a subsidiary of Gulf Oil Corporation, together control 75% of the paving business in Southern California. It is claimed, and for the purposes of this order it is assumed, that Sully-Miller and Industrial Asphalt, Inc. are given preferential prices for liquid asphalt by their parent corporations which produce asphalt and that it is as a result of this competitive advantage that they have injured plaintiffs and gained for themselves a substantial corner on the paving market in Southern California.

Defendants' dealings in asphaltic concrete bear two possible relationships to restraints of interstate commerce. It is conceivable that a monopoly with respect to a product used in interstate highways could so increase the price of the product and the subsequent cost of the highways that fewer and poorer highways would be constructed and that interstate commerce could thus be affected. There is no evidence which gives any substance to this possibility. *Cf. Uniform Oil Co. v. Phillips Petroleum Co.*, 400 F.2d 267, (9th Cir. 1968).

As indicated, liquid asphalt does move in interstate commerce although the asphalt used by plaintiffs and defendants here was produced in California. It is possible as in *Las Vegas Merchant Plumbers Ass'n v. United States, supra,* that the agreement to divide an intrastate market for products moving in interstate commerce can affect commerce. It is sufficient here to say that plaintiffs do not suggst a theory (much less support it) by which a division of an intrastate market for asphaltic concrete produced from local liquid asphalt could affect the interstate market in liquid asphalt.

I conclude that the local activitis of the defendants with regard to asphaltic concrete did not have a substantial impact on interstate commerce.

I conclude that the court should not, if it could, accept jurisdiction of the disputes as to the asphaltic concrete under the

California law as pendent to the court's jurisdiction of the liquid asphalt claims. The issues differ not only because of the difference in the product involved but because of the difference in the nature of the cases. The case as to liquid asphalt is an action by a consumer seeking to recover damages caused by an alleged conspiracy to fix prices. To the extent that plaintiffs seek that relief their case remains. The issues raised as to the various methods of unfair competition practiced by the defendants in connection with asphaltic concrete are not common to the liquid asphalt claims—they require a consideration of different facts and different laws. It is not in the interest of the expeditious treatment of these cases to add any extraneous issues to the massive and complex liquid asphalt litigation.

The defendant Sully-Miller neither produces nor markets liquid asphalt and does no interstate business of any kind.

IT IS THEREFORE ORDERED:

1. As to defendant Sully-Miller Contracting Company:

That there being no issue of material fact as to the defendant Sully-Miller Contracting Company its motion for summary judgment should be and is hereby granted and the plaintiffs are denied all relief.

2. As to the remaining defendants:

All discovery and further proceedings herein shall be limited to the following issues: (a) With respect to liquid asphalt whether said defendants, or any of them, violated 15 U.S.C. §§ 1, 2, 3, 13(a), 14, or 18, and if so (b) Whether and to what extent, if any, plaintiffs or any of them were injured in their businesses or properties by reason of said violations, if any.

3. No discovery or further proceedings shall be had herein with respect to any of the remaining claims herein asserted, *viz.*:

(a) Any claims that defendants, or any of them, violated 15 U.S.C. §§ 1 or 2 in connection with the marketing of asphaltic concrete;

(b) Any claims that defendants, or any of them, violated 15 U.S.C. § 13(a) in connection with the marketing of asphaltic concrete;

(c) Any claims that defendants, or any of them, violated 15 U.S.C. § 14, in connection with the marketing of asphaltic concrete;

(d) The claim that defendant Union Oil Company of California violated 15 U.S.C. § 18 by acquiring all the capital stock of defendant Sully-Miller Contracting Company;

(e) Any claims that defendants, or any of them, violated Section 16720 of the California Business and Professions Code with respect to asphaltic concrete.

I am of the opinion that the orders made herein and each of them involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from these orders may materially advance the ultimate termination of the litigation.

DATED this 29th day of May, 1972.

/s/ RUSSELL E. SMITH
United States District Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit

In Re Coordinated Pre-Trial Proceedings in WESTERN LIQUID ASPHALT CASES

COPP PAVING COMPANY, INC.; COPP EQUIPMENT COMPANY, INC.; and ERNEST A. COPP,
Appellants,

vs.

GULF OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; INDUSTRIAL ASPHALT, INC., SULLY-MILLER CONTRACTING COMPANY; and EDGINGTON OIL COMPANY,
Appellees.

No. 72-2152

[October 3, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: CARTER and GOODWIN, Circuit Judges, and FERGUSON, District Judge.*

GOODWIN, Judge:

Copp Paving and related antitrust plaintiffs appeal from the dismissal of their claims against certain major oil companies and related defendants for want of jurisdiction.

Plaintiffs process asphaltic concrete and sell and deliver paving materials to construction jobs in California. Except for some imported crude oil which may find its way into their end-product,

*The Honorable Warren John Ferguson, United States District Judge for the Central District of California, sitting by designation.

plaintiffs concede that they process California-produced materials and deliver all of their product to California construction sites.

Defendants Gulf Oil, Union Oil of California, and Edgington Oil Company are producers of asphaltic oil; defendants Industrial Asphalt, Inc., and Sully-Miller Contracting Company are competitors of plaintiffs.

Plaintiffs alleged that defendants had violated §§ 1 and 2 of the Sherman Act by conspiracy in restraint of trade and monopolization, §§ 3 and 7 of the Clayton Act by tying agreements and illegal acquisitions (of Sully-Miller by Union and Industrial Asphalt by Gulf), and § 2(a) of the Robinson-Patman Act by price discrimination.

The district court held, on these facts that the essential element of interstate commerce was missing from the asserted claims based upon various sections of the Sherman, Clayton, and Robinson-Patman Acts.

This interlocutory appeal was taken pursuant to 28 U.S.C. § 1292(b) because the threshold question of interstate commerce is critical in the further course of this and related litigation.

The district court held that the production of asphaltic concrete, a substantial amount of which was used to construct interstate highways, was neither "in" nor did it "affect" interstate commerce. We hold that the production of asphalt for use in interstate highways rendered the producers "instrumentalities" of interstate commerce and placed them "in" that commerce as a matter of law.

We start with the proposition that Congress in passing the Sherman Act desired to exercise the full extent of its Constitutional power in restraining trust and monopoly agreements. *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 558-59 (1944); *Rasmussen v. American Dairy Ass'n.*, 472 F.2d 517 (9th Cir. 1972) (quoting); *United States v. South Florida Asphalt Co.*, 329 F.2d 860, 867 (5th Cir.) (quoting), *cert. denied sub nom. H. R. Wright, Inc. v. United States*, 379 U.S. 880

(1964); *United States v. Chrysler Corp. Parts Wholesalers, Northwest Region*, 180 F.2d 557, 559 (9th Cir. 1950) (quoting). As the Supreme Court's reading of the commerce clause has broadened over time, so has its interpretation of the jurisdictional scope of the Sherman Act. *See* cases collected at *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 230-31 (1948). Thus, every Sherman-Act holding that jurisdiction does not lie is a holding that the evil alleged is beyond the power of Congress to control. Conversely, a holding that conduct is within the reach of Congress' constitutional power for some other purpose is entitled to great weight in a Sherman Act case. *See Rasmussen v. American Dairy Ass'n., supra* at 522, 523 n.13; *Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871 (5th Cir. 1964); *De Gorter v. F.T.C.*, 244 F.2d 270 (9th Cir. 1957).

There are, of course, limits to the technique of relying on determinations of the breadth of the commerce power made in one area of congressional regulation in order to determine the breadth of the commerce power in another. First, "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business." *United States v. Yellow Cab Co.*, 332 U.S. 218, 231 (1947). *See North American Co. v. SEC*, 327 U.S. 686, 705 (1946); *Overstreet v. North Shore Corp.*, 318 U.S. 125, 128 (1943). Although the power of Congress over commerce is unitary, different evils sought to be regulated may impinge on commerce in different ways and to differing extents, and the power of Congress may vary accordingly. *See McLeod v. Threlkeld*, 319 U.S. 491, 495 (1943). Regulation of business practices through the antitrust laws, for example, may justifiably reach further than some other types of regulation because the antitrust laws are concerned directly with aiding the flow of commerce.

Second, the Congressional power is not over persons but over practices. It is irrelevant that a person is in some way engaged in interstate commerce if the practice complained of is in no way related to that commerce. *Yellow Cab Co. of Nevada v. Cab Employees, Automotive & Warehousemen, Local 881*, 457 F.2d 1032, 1034 (9th Cir. 1972).

For example, in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), the Supreme Court held that there was Sherman Act jurisdiction over that portion of a complaint which alleged that the Yellow Cab Company had attempted to monopolize the carrying of passengers between two interstate railroad termini in Chicago, but held that there was no jurisdiction over the allegations that the same company had violated the Sherman Act in its intracity carriage. And in *Page v. Work*, 290 F.2d 323 (9th Cir. 1961), this circuit held that it lacked jurisdiction over a claim by a Los Angeles newspaper that other papers had injured it by diverting some of its legal advertising, a strictly local product, although the newspapers were subject to federal regulation in other ways because they purchased out-of-state newsprint and sold a few papers out of state. While a conspiracy of the newspapers to control the interstate aspects of their business obviously would have been "in" commerce, a conspiracy involving only a strictly local product was only within the power of Congress to control if it "affected" commerce.

A very different function is involved when courts pass on a congressional decision that certain activities affect commerce than when the courts are asked to determine that question for themselves. *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964). A congressional determination that particular activities affect commerce receives deference in court. *United States v. Rodriguez-Camacho*, 468 F.2d 1220 (9th Cir. 1972). However, under the Sherman Act, Congress has left it to the courts to determine whether activities affect interstate commerce. *United States v. Darby*, 312 U.S. 100, 120 (1941). Therefore, in reviewing a defendant's conduct for compliance with the Sherman, Clayton, and Robinson-Patman Acts, the court must make its own decision.

In *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), the Supreme Court held that vehicular roads were instrumentalities of interstate commerce and that persons repairing them were "engaged in commerce" and therefore covered by the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* In *Alstate Construction v. Durkin*, 345 U.S. 13 (1953), the Supreme Court extended *Overstreet* to hold that those engaged in the local production of a road surfacing mixture for local use in an interstate highway were also covered by the Act. The test said to be applicable to these cases was "whether the work is so directly and vitally related to the functioning of an instrumentality of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity." *Mitchell v. S. W. Vollmer & Co.*, 349 U.S. 427, 429 (1955).

We agree with the Fifth Circuit in *Fort Lauderdale v. East Coast Asphalt Corp., supra*, that those cases control this one. If highway builders and suppliers are "in" commerce because of their close relationship with an instrumentality of interstate commerce for labor relations purposes, they are in commerce for the regulation of price fixing and monopolization. *See Mandeville Island Farms, Inc. v. American Sugar Co., supra. See also United States v. Shubert*, 348 U.S. 222, 226-27 (1955). Furthermore it is not incidental activities unrelated to the interstate nexus of these businesses which were alleged to have been involved here, but illegal manipulation of the very costs and products which put these same businesses "in" interstate commerce for purposes of the Fair Labor Standards Act. The reach of Congress' commerce power for Sherman Act purposes is no shorter than it is for any other purpose.

Plaintiffs asserted claims under the Clayton and Robinson-Patman Acts as well as under the Sherman Act. Section 3 of the Clayton Act prohibits tying arrangements by "any person engaged in commerce." For there to be jurisdiction under the Clayton Act § 7, both the "acquired" and the "acquiring" companies must be "in commerce." Robinson-Patman price discrimination jurisdiction depends on the sales involved, as well as the selling company being "in commerce." Defendants argue that the "in commerce" requirements of these statutes are satisfied only by sales which cross state lines. While recognizing that this position has recently been adopted by another circuit with respect to the Robinson-Patman Act, it should be noted that the court there did not consider, because the facts did not require it to, whether this state-line test also applies to sales of a commodity (such as asphalt used in the construction of interstate highways) which is itself closely linked to an instrumentality of interstate commerce. *See Littlejohn v. Shell Oil Co.*, 42 U.S.L.W. 2114 (5th Cir. Aug. 10, 1973) (en banc). We see no reason why sales which are "in commerce" because of their nexus with an instrumentality of interstate commerce must also satisfy a state-line test of "in commerce." To be sure, the statutory language of the Clayton and Robinson-Patman Acts is not as broad and flexible as that of the Sherman Act. Nevertheless, the fact that these acts were intended to supplement the purpose and effect of the Sherman Act supports a uniform interpretation of the "in commerce" requirement present in all three acts. *See United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922). *See also* Conference Rep. H. R. Rep. No. 2951, 74th Cong., 2d Sess. (1936). Nor can we accept defendants' argument that the plaintiffs must show not only that the parties and sales are "in" commerce but must show that competition was injured before the court has jurisdiction. This is the result of confusing the substantive with

the jurisdictional requirements of the antitrust laws. It is not necessary for a plaintiff to prove his whole case in order to give the courts jurisdiction to hear it.

Plaintiff also appeals the district court's refusal to take pendent jurisdiction of a state antitrust claim against defendants. In view of the complexity of the litigation and number of parties in these consolidated antitrust actions, the refusal was within the discretion of the district court.

The partial summary judgment in favor of all defendants except the defendant Sully-Miller is reversed, and the cause is remanded for further proceedings consistent with the views expressed herein.

The question of the summary judgment in favor of the defendant Sully-Miller is reserved, as it was not properly before this court under Fed. R. Civ. P. 54(b).

Reversed and remanded.

In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,

Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 28, 1973

WRIT OF CERTIORARI GRANTED MARCH 25, 1974

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(No. 72-2152)

June 30, 1972	Filed Order (Koelsch & Wright) granting Appellants leave to appeal under 1292(b) & F.R.A.P.
June 30, 1972	Docketed cause and entered appearances of counsel.
August 14, 1972	Filed certified transcript of record on appeal in eleven (11) volumes: Vols. 1-9, Pleadings, original only; Vols. 10 & 11, Reporter's Transcript, original and one copy. Filed original exhibits in two boxes in Room 219.
September 26, 1972	Filed 25 Appellants' Brief.
October 19, 1972	Filed Motion and Order (Duniway) extending time to file appellees' (Union Oil & Sully-Miller, et al.) brief to December 5, 1972. Subject to reconsideration if opposition is filed in 7 days.
December 5, 1972	Filed 25 Appellees' Brief.
December 26, 1972	Filed Motion and Order (Chambers) extending time to file appellants' reply brief to January 29, 1973.
February 5, 1973	Filed Stipulation and Order (Chambers) extending time to file appellants' reply brief to February 5, 1973.
February 5, 1973	Filed 25 Appellants' Reply Brief.
May 16, 1973	Filed Order (Carter, Goodwin, Ferguson) granting appellants' motion to modify Appellants' Reply Brief, striking paragraph V, pages 28 & 29.
June 15, 1973	Argued and submitted to Carter, Goodwin, Ferguson.

October 3, 1973	Ordered Opinion (Goodwin) filed and judgment to be filed and entered.
October 3, 1973	Filed Opinion—reversed and remanded.
October 3, 1973	Filed & entered Judgment.
October 24, 1973	Filed Order (Goodwin) staying issuance of mandate to November 23, 1973.
November 28, 1973	Filed Order (Goodwin) staying issuance of mandate to December 23rd.
December 27, 1973	Filed Order (Goodwin) staying issuance of mandate to January 2, 1974.
January 4, 1974	Advised by Supreme Court (Lorson) that petition for certiorari filed 12/28, S.C. #73-1012.
January 9, 1974	Received notice from Clerk, Supreme Court re filing petition for writ of certiorari, S.C. #73-1012.
April 1, 1974	Filed certified copy of Supreme Court Order granting certiorari, 3/25/74.

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United States District Court
Central District of California

Civil Action No. 70-1394-DWW

[Filed June 24, 1970]

Copp Paving Company, Inc.
Copp Equipment Company, Inc.
Ernest A. Copp,
Plaintiffs,

vs.

Gulf Oil Company, Union Oil Company of California, & Industrial Asphalt, Inc. Sully Miller Contracting Company,
Defendants.

COMPLAINT FOR RELIEF UNDER THE SHERMAN ANTI-TRUST ACT, THE CLAYTON ACT. JURY TRIAL DEMANDED

Plaintiff alleges as follows:

Count I

This complaint is filed and this action arises under the Anti-Trust Laws of the United States, more particularly as follows: Under Section 2 of the Act of Congress of July 2, 1890 [Chapter 647, 26, Stat. 209 (15 U.S.C.2)] as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and

Monopolies," commonly known as the Sherman Act, and under Sections 4, 7 and 12 of the Act of Congress of October 15, 1914 [Chapter 323, 38 Stat. 731, 736 (154 U.S.C. 15, —22)] as amended entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes," commonly known as the Clayton Act, and under 28 U.S.C. 13, 37, as hereinafter more fully appears, in order to recover damages against defendants and each of them for injury to plaintiff in their business or property resulting from the defendants and each of their violation of the Anti-Trust Laws of the United States.

Count II

Defendants and each of them have offices transacting businesses and are found within the Central District of California. The violation of law hereinafter described has been and is being carried on within this district.

DEFENDANTS

Count III

Gulf Oil Company, hereinafter referred to as "Gulf" is made a defendant herein. Gulf is organized and existing under the laws of the State of Delaware, has its principal place of business in Los Angeles, California, and is an integrated oil producer, refiner and marketeer. Gulf owns one hundred percent (100%) of defendant, Industrial Asphalt, Inc.

Count IV

Defendant Union Oil Company of California, was incorporated in California on November 17, 1890, has its principal place of business in Los Angeles, California. Union Oil Company is an integrated oil producer, refiner and marketeer. Union is tenth in size among United States oil companies, operates nine refineries

with approximately 382,000 barrels per day capacity, 1500 wholesale and bulk distributorship facilities, 18,300 service stations and other rental outlets.

Count V

Industrial Asphalt, Inc., is a wholly owned subsidiary of Gulf Oil Company, was incorporated in California in 1963 and has its principal place of business in Van Nuys. In 1963 Gulf purchased Industrial Asphalt for stock. Industrial is primarily in the construction business and operates several hot plants. The location of Industrial's operations are as follows:
Orange County, Los Angeles County, Ventura County, San Luis Obispo, West Los Angeles Area, San Bernardino County, Riverside County and San Diego County.

Count VI

Defendant Sully Miller Contracting Company is a wholly owned subsidiary of Union Oil Company of California, was incorporated in California in 1923 and its principal place of business is Long Beach, California. Sully Miller is primarily in the business of operating asphaltic concrete "hot plants" and contracting street improvements.

Count VII

Copp Paving Company, Inc. was incorporated in the State of California on June 1, 1956, and its principal place of business is at 11710 East 166th Street, Artesia, California.

Count VIII

Plaintiff Copp Equipment Company, Inc., was incorporated on November 20, 1956, and its principal place of business is 11700 East 166th Street, Artesia, California.

Count IX

Plaintiff, Ernest A. Copp, started the business under the name of Copp Paving Company in June, 1954.

Plaintiffs are primarily engaged in the grading and paving of streets. During the period of 1954 to 1960, Copp Paving Company bought most of its asphalt paving materials from Industrial Asphalt and during this same period was one of its bigger accounts.

TRADING AND COMMERCE

Count X

Asphaltic concrete paving materials are made by combining hot, crushed rock, sand, a cement-like filler and hot asphaltic oil into a homogenous mass in a mixing plant, commonly called a "hot plant". The rock and sand are purchased from a rock plant. The oil is purchased from an oil company. Upon arrival of the rock and sand at the "hot plant", it is dumped into a stockpile bunker according to size and type of material. The stockpiles are at ground level and the material is dumped into a hopper which conveys the material overhead to the correct stockpile. This system is known as a "stacker." The filler is stored in a cement silo. The asphaltic oil is delivered hot in insulated trucks and deposited into heated and insulated underground oil tanks in the plant. The various compounds are subsequently mixed at approximately 375° and the hot mixed asphalt is discharged into a dump truck. The truck then delivers the asphalt to the particular job. The area of trade involved also includes the general contracting area; primarily, streets, roadways and parking lots, the owning, operating, leasing and renting of heavy equipment, particularly used in the paving area.

OFFENSES CHARGED

Count XI

In 1958, Norwalk Asphalt Company built a plant at Bloomfield Avenue and Imperial Highway in Santa Fe Springs. In 1960, Copp Paving Company built a hot plant one-half mile northeast

of Norwalk's plant. From 1958 on, Industrial would underbid all competitors, even at a loss, putting economic pressure on plaintiff and Norwalk Asphalt Company. Industrial acquired Norwalk Asphalt in 1963 simultaneously with Industrial being acquired by Gulf.

On or about December 1, 1963, Gulf acquired Industrial Asphalt. Subsequent to said acquisition, Defendant Gulf, through its wholly owned subsidiary, Industrial, has attempted to monopolize and has monopolized the purchase, transportation and the sale of the asphaltic concrete and because of the vast amount of resources of defendant, Gulf, and the availability of the liquid asphalt to Industrial at unrealistic prices, defendant has engaged in a series of acts, practices and policies with the intent and purpose and with the object and effect of unlawfully interfering with plaintiff's business. By those acts, practices and policies, defendant has unlawfully intended to attempt to monopolize or to create and maintain a monopoly and has monopolized the purchase, transportation and sale in interstate commerce of asphaltic concrete and as a result of said intent, defendant has unlawfully and wrongfully injured and destroyed plaintiff's businesses, all of which is unlawful and against public policy and is in violation of Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C.2), commonly known as the Sherman Act.

Count XIII

Further, the effect of the Stock Acquisition alleged above in XII may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Act of Congress of October 15, 1914, commonly known as the Clayton Act (38 Stat. 731 15 U.S.C. Section 18, as amended).

Count XIV

Defendant, Industrial, has also acquired at various times the several companies which also were in competition with plaintiffs

and defendant creating a violation of said Section 7 of the Clayton Act in that it substantially lessens competition or tends to create a monopoly in the following manner: Various entities that have been acquired have been eliminated as potential, substantial, independent, competitive entities in the asphaltic concrete business. Actual and potential competition between Industrial and the various companies acquired has been eliminated.

Industrial Asphalt's acquisition of various other "hot plants" in the form of horizontal acquisitions effectively eliminated all competition in the effective competitive areas.

Beginning at least as early as December 19, 1963, and continuing thereafter until the present time, the defendants named the co-conspirators engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in the asphalt production and sales.

Count XV

On or about September, 1964, Union Oil Company acquired Sully Miller, Inc. Subsequent to said acquisition, defendant, Union, through its wholly owned subsidiary, Sully Miller has attempted to monopolize and has monopolized the purchase, transportation and sale of the asphaltic concrete and because of the vast amount of resources of defendant, Union, and the availability of the liquid asphalt to Sully Miller at unrealistic prices, defendant has engaged in a series of acts, practices and policies with the intent and purpose and with the object and effect of unlawfully interfering with plaintiff's business. By those acts, practices and policies, defendant has unlawfully intended to attempt to monopolize or to create and maintain a monopoly and has monopolized the purchase, transportation and sale in interstate commerce of asphaltic concrete and as a result of said intent, defendant has unlawfully and wrongfully injured and destroyed plaintiff's businesses, all of which is unlawful and

against public policy and is in violation of Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C. 2), commonly known as the Sherman Act.

Count XVI

Defendants further leased and sold in such a manner to discriminate in price between different purchasers of commodities of like, grade and quality and the effect of such discrimination is to substantially lessen competition or tends to create a monopoly. In formulating and effectuating the aforesaid combination and conspiracy and price fixing, said defendants and co-conspirators did those things which as hereinbefore alleged, they combined and conspired to do, including among other things, the following:

Gulf Oil Company acquired Industrial Asphalt resulting in a vertical integration, which because of the vast financial resources of defendant, Gulf, and the availability of the raw materials at basically a give-away price. This acquisition eliminates competition to the detriment of plaintiff.

Union Oil Company's acquisitions of Sully Miller Contracting Company resulted in a vertical integration which substantially lessened competition to the detriment of plaintiff.

Sully Miller, Inc's horizontal acquisitions effectively eliminated competition in the competitive area.

Defendants and each of them conspired within to combine to monopolize or attempt to monopolize the trade and commerce defined above as follows:

The defendants and each of them among themselves effectively have divided the geographic areas of competition so that they would effectively not be competing against each other but rather to combine their resources to eliminate such competition.

Defendant Sully Miller, on or about May 12, 1969, and continuously have engaged in tie-in practices. By said tie-in arrangement, Sully Miller would agree to sell base rock material

and other material substantially cheaper if the particular contractor would buy the asphalt from Sully Miller.

Industrial Asphalt has further attempted to monopolize the area by over-extending credit to its potential customers, thereby locking in said potentiai customers to Industrial Asphalt.

Defendant, Industrial Asphalt and defendant, Sully Miller, and each of them maintain artificially high prices in those particular areas where there is no competition or slight competition and sell their products at an artificially low price, at times, substantially below cost, in those areas geographically where the aforesaid defendants compete with plaintiffs.

That certain combination and conspiracy further consisted of a continuing agreement and understanding between defendants and each of them to raise, fix, stabilize and maintain the prices of the product and because of such conspiracy, prices were raised, fixed, stabilized and maintained at non-competitive levels and the customers have been deprived of free and open competition.

Plaintiff has been substantially injured in a specific amount not yet ascertained since such determination will require discovery and analysis of defendants' books and records. When these amounts have been determined, plaintiffs will seek leave of court to amend this application and to include such amount.

PRAYER

Wherefore, plaintiffs pray that:

1. The alleged combination and conspiracy among the defendants herein named be adjudged and decreed to be in unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

2. That defendant has unlawfully attempted to monopolize and has monopolized the purchase, transportation, leasing and sale of asphaltic concrete products in violation of Section 2 of the Sherman Act.

3. By selling at different prices, with the purpose and intent of driving the competition out of business or destroying competition, defendants have violated Section 2 of the Clayton Act of 1914, as amended, by the Robinson-Patman Act of 1936.

4. By inducing customers to enter into tie-in arrangements the effect of which is to substantially lessen competition, Section 3 of the Clayton Act has been violated.

5. That the defendant and all persons, firms and corporations acting on their behalf or under their direction or control, be permanently enjoined from engaging in carrying out or renewing any contracts, agreements, practices or understandings or claiming any prices thereunder having the purpose of effect of continuing, revising or renewing the aforesaid violations of the Sherman Act, the Clayton Act and the Robinson-Patman Act or any contracts, agreements, combination or conspiracy having like or similar purpose or effect. That the acquisition of defendant, Gulf Oil Company, of Industrial Asphalt and defendant, Union Oil Company's acquisition of Sully Miller Contracting Company and the various acquisitions of Sully Miller Contracting Company and Industrial Asphalt be adjudged to be in violation of Section 7 of the Clayton Act.

6. That the defendant, Union Oil Company, be required to divest itself of Sully Miller Contracting Company and Gulf Oil Company be required to divest itself of Industrial Asphalt, Inc.

7. Judgment be entered in favor of plaintiffs against the defendants jointly and severally for the injury and damages caused plaintiffs in an amount three-fold the actual damages they have sustained with interest thereon.

8. Plaintiffs recover their cost of litigation, including reasonable attorney's fees.

9. Plaintiffs be granted such other, further and different relief as the nature of the case may require and as may seem just and proper to the court.

CUMMINS, WHITE, BREIDENBACH & ALPHSON

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[Filed December 30, 1970]

United States District Court
Central District of California

CIVIL ACTION NO. 70-1394-DWW

Copp Paving Company, Inc.; Copp Equipment Company, Inc.; and Ernest A. Copp,
Plaintiffs,

v.

Gulf Oil Company; Union Oil Company of California, Industrial Asphalt, Inc.; Sully-Miller Contracting Company; and Edgington Oil Company,
Defendants.

AMENDED COMPLAINT UNDER THE ANTITRUST LAWS OF THE UNITED STATES AND UNDER THE CALIFORNIA CARTWRIGHT ACT FOR DAMAGES AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

The above-named plaintiffs file this Amended Complaint under Rule 15A of the Federal Rules of Civil Proecdure against the above-named defendants, and demanding trial by jury, complain and allege as follows:

FIRST CLAIM FOR RELIEF

I

JURISDICTION AND VENUE

1. This claim for relief is filed under Sections 4 and 16 of the Clayton Act (15 U.S.C. 4, 26) to recover damages from, and to obtain injunctive relief against, the defendants for violations of the Antitrust Laws of the United States, including 15 U.S.C., Sections 1, 2, 13, 13a, 14 and 18, as hereinafter alleged.

2. Each defendant transacts business, maintains an office, and is found within the Central District of California. The interstate trade and commerce hereinafter described is carried on, in part, within this District. Unlawful acts done pursuant to violations of Sections 1 and 2 of the Sherman Act have been performed within the Central District of California.

II

PLAINTIFFS

3. Plaintiff Copp Paving Company, Inc. (hereinafter sometimes referred to as "Copp Paving") is a California corporation, with its principal place of business in Artesia, California. Plaintiff Copp Equipment Company, Inc. (hereinafter someteimes referred to as "Copp Equipment") is a California corporation, with its principal place of business in Artesia, California. Plaintiff Ernest Copp is the owner of substantially all of the stock of Copp Paving and Copp Equipment. Plaintiffs are engaged principally in the business of manufacturing and selling of asphaltic concrete and the grading and paving of streets employing asphaltic concrete.

III

DEFENDANTS AND CO-CONSPIRATORS

4. Defendant Gulf Oil Company (hereinafter sometimes referred to as "Gulf") is a Delaware corporation with its principal

place of business in Los Angeles, California. Gulf produces and refines crude petroleum and markets petroleum products throughout the United States, including the Central District of California and in foreign countries. Gulf owns 100% of defendant Industrial Asphalt, Inc.

5. Defendant Industrial Asphalt, Inc. (hereinafter sometimes referred to as "Industrial") is a California corporation with its principal place of business in Van Nuys, California. Industrial is primarily engaged in the construction business and operates "Hot Plants" for the manufacture of asphaltic concrete at each "Hot Plant" location in Orange County, Los Angeles County, Ventura County, San Luis Obispo County, San Bernardino County, Riverside County, San Diego County, and West Los Angeles area. Gulf obtained control of Industrial by acquisition of 100% of Industrial's capital stock in 1963.

6. Defendant Union Oil Company of California (hereinafter sometimes referred to as "Union") is a California corporation with its principal place of business in Los Angeles, California. Union produces and refines crude petroleum and markets petroleum products throughout the United States, including the Central District of California, and in foreign countries. Union owns 100% of the capital stock of Sully Miller Contracting Company.

7. Defendant Sully Miller Contracting Company (hereinafter sometimes referred to as "Sully Miller") is a California corporation having its principal place of business in Long Beach, California. Sully Miller is engaged primarily in the business of operating asphaltic concrete "Hot Plants" and contracting street improvements. Union obtained control of defendant Sully Miller by acquiring 100% of its capital stock in 1964.

8. Defendant Edgington Oil Company (hereinafter sometimes referred to as "Edgington") is a California corporation, with its principal place of business in Long Beach, California.

Edgington produces and refines crude petroleum and markets petroleum products in California, including the Central District of California, in other states, and in foreign countries.

9. Various other firms, corporations and individuals presently unknown to plaintiffs participated as co-conspirators in the violations of law alleged herein and performed acts and made statements in furtherance thereof. Plaintiffs will seek leave of Court to amend this complaint to name such firms, corporations and individuals when their identities become known to plaintiffs.

IV

NATURE OF TRADE AND COMMERCE

10. Hot asphalt oil is one of the by-products obtained from the refining of domestic and imported crude petroleum. One of the substantial uses of hot asphalt oil is in connection with the construction, maintenance, surfacing, resurfacing and repairing of roads and highways.

Asphaltic concrete paving materials are made by combining hot, crushed rock, sand, a cement-like filler and hot asphalt oil into a homogeneous mass in a mixing plant, commonly called a "hot plant". The rock and sand are purchased from a rock plant. The hot asphalt oil is purchased from an oil company. Upon arrival of the rock and sand at the "hot plant", it is dumped into a stockpile bunker according to size and type of material. The stockpiles are at ground level and the material is dumped into a hopper which conveys the material overhead to the correct stockpile. This system is known as a "stacker". The filler is stored in a cement silo. The hot asphalt oil is delivered hot in insulated trucks and deposited into heated and insulated underground oil tanks in the plant. The various compounds are subsequently mixed at approximately 375° and the hot asphaltic concrete is discharged into a dump truck. The truck then delivers

the asphaltic concrete to the particular job. Hot asphalt oil customarily represents approximately 25% of the cost of all of the materials that are combined in the manufacture of asphaltic concrete.

Hot asphalt oil is also used to repair roads and highways in accordance with other techniques.

11. The total annual production and importation of hot asphalt oil into the United States ordinarily amounts to more than 6,000,000 tons, of which ninety percent (90%) is recovered from the refining of domestic and imported crude petroleum.

12. Over seventy-five percent (75%) of the total production of hot asphalt oil is used in the construction and maintenance of roads and highways. Approximately 14,000,000 square yards of asphalt pavement are constructed annually in the United States.

13. The total annual production of hot asphalt oil in California exceeds 1,000,000 tons per year, of which at least seventy-five percent (75%) is used in the construction and maintenance of roads and highways within the State.

14. Defendants Gulf, Union and Edgington operate refineries within the State of California in which substantial quantities of hot asphalt oil are manufactured from domestic and imported crude petroleum. Hot asphalt oil is shipped from these refineries within the State of California in interstate and foreign commerce to other states of the United States and to interstate and foreign customers. Plaintiffs and defendants Industrial and Sully Miller purchase hot asphalt oil produced from imported and domestic crude petroleum and manufacture asphaltic concrete, sometimes referred to as "asphalt", therefrom as hereinabove set forth.

Defendants Gulf, Union and Edgington sell to end users and contractors, including plaintiffs, substantial quantities of hot asphalt oil to be used as hot asphalt or as asphaltic concrete for constructing, maintaining, surfacing, resurfacing and repairing roads and highways, including Federal interstate system highways

and highways directly connected to interstate highways. Thus, the business of supplying hot asphalt oil or asphaltic concrete for road purposes is in and directly affects interstate commerce.

15. Plaintiffs purchase hot asphalt oil and manufacture asphaltic concrete therefrom at their hot plant in Santa Fe Springs, California. Plaintiffs thereafter either sell asphaltic concrete to third parties or use that asphaltic concrete in carrying on their business in the installation, maintenance and repair of roads and highways. Plaintiffs are in direct competition with defendants Industrial and Sully Miller in the sale of asphaltic concrete and the installation, maintenance and repair of roads and highways.

16. The movement in interstate commerce of hot asphalt oil manufactured from domestic and imported crude petroleum used in the business of supplying hot asphalt oil or asphaltic concrete for interstate and local highways and roads is in and directly affects interstate commerce.

V

OFFENSES CHARGED

17. Beginning at a date unknown to plaintiffs and continuing at least to the date of the filing of this complaint, defendants, and each of them, together with the co-conspirators, have engaged in a continuous agreement, combination, conspiracy and concert of action in the State of California, including the County of Los Angeles, and in other western states of the United States, in unreasonable restraint of interstate commerce and trade, in the sale of hot asphalt oil, asphaltic concrete, and in the business of grading and paving of roads and highways and the defendants, and each of them, have purposely and with deliberate and specific intent, attempted to monopolize, conspired with each other and the co-conspirators, to monopolize and did monopolize, the aforesaid trade and commerce, all in violation of Sections 1 and 2 of the Sherman Act.

18. One of the purposes and objectives of the aforesaid combination and conspiracy to restrain and the combination and conspiracy to monopolize, attempt to monopolize and monopolization has been the destruction and elimination of plaintiffs as a viable entity so that:

(a) Plaintiffs would be eliminated as a competitor of Industrial and Sully Miller:

(b) Plaintiffs would be penalized for remaining as an independent competitor in the manufacture and sale of asphaltic concrete, and in the business of grading and paving highways and roads.

19. In furtherance of the above-described violations of the Antitrust Laws, the defendants, and each of them, together with the co-conspirators, agreed to and in fact engaged, among other things, in the following acts and practices:

(a) Fixed, stabilized and maintained the prices at which hot asphalt oil would be sold to end users, including governmental agencies and to hot plant owners, including plaintiffs;

(b) Allocated and exchanged between each other supplies of crude petroleum and petroleum products, including, but not limited to supplies of hot asphalt;

(c) Fixed, stabilized and maintained the prices at which asphaltic concrete would be sold to end users, including governmental agencies, and to contractors;

(d) Eliminated competition and obtained and exercised monopoly power in the operation of hot plants and in the sale of asphaltic concrete by acquiring ownership and control of a substantial number of hot plants, including more than sixty percent (60%) of all of the hot oil plants operated in Southern California and in Los Angeles and Orange Counties;

(e) Allocated and divided, on a geographical basis and upon a customer basis, the outlets to whom hot asphalt oil and asphaltic concrete would be sold;

(f) Sold asphaltic concrete at unreasonably low prices in the areas in which they competed with plaintiffs and subsidized said unreasonably low prices by artificially maintaining prices in other areas in which plaintiffs did not compete;

(g) Sold and installed asphaltic concrete at or below cost in areas where plaintiffs competed with defendants and subsidized said sales by artificially maintaining higher prices in areas where plaintiffs did not compete;

(h) Threatened actual and potential customers of plaintiffs that unless they refrained from purchasing asphaltic concrete from plaintiffs in plaintiffs' area of competition, that said customers would be unable to obtain supplies of asphaltic concrete at a competitive price in other areas where said customers had no other source of supply other than defendants;

(i) Extended unreasonably advantageous credit terms to customers in order to preclude said customers from purchasing asphaltic concrete from any other suppliers, including plaintiffs;

(j) Required customers who were indebted to defendants to purchase all of their asphaltic concrete from said defendants upon threat of immediately enforcing the collection of outstanding debt, thereby precluding said customers from purchasing asphaltic concrete from other suppliers, including plaintiffs;

(k) Tied the sale of other commodities, including base rock material, and tied the availability of credit to the sale of asphaltic concrete so as to induce and require purchasers of asphaltic concrete to purchase their supply thereof from Sully Miller and not to purchase their supply from third parties, including plaintiffs;

(l) Sold hot asphalt oil and asphaltic concrete in such a manner as to discriminate in price between purchasers of such commodities of like grade and quality where the effect of such discrimination was to substantially lessen competition and tended to create a monopoly;

(m) Gulf acquired all of the capital stock of Industrial, as hereinabove alleged, and the effect thereof may be substantially to lessen competition and to tend to create a monopoly, in violation of Section 7 of the Act of Congress of October 15, 1914, commonly known as the Clayton Act, 15 U.S.C., Section 18, as amended; and

(n) Union acquired all of the capital stock of Sully Miller, as hereinabove alleged, and the effect of that acquisition may be substantially to lessen competition, and to tend to create a monopoly, in violation of Section 7 of the Act of Congress of October 15, 1914, commonly known as the Clayton Act, 15 U.S.C., Section 18, as amended.

VI

INJURY TO PLAINTIFFS

20. By reason of the aforesaid antitrust violations, plaintiffs have suffered grave damage in loss of profits, goodwill and the value of their company as a going concern. The exact amount of damage has not yet been fully ascertained, but when fully determined, plaintiffs will seek leave to assert the amount of damages herein.

SECOND CLAIM FOR RELIEF

VII

JURISDICTION AND VENUE

21. This claim for relief arises under California Business and Professions Code 16750 to recover damages from, and to obtain injunctive relief against, the defendants for violations of the California Business and Professions Code Section 16720 (sometimes referred to as the "Cartwright Act"). This claim is substantially and directly related to plaintiffs' First Claim for Relief, and by reason thereof, this Court has pendant jurisdiction of this claim.

22. Plaintiffs hereby incorporate by reference Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14 (the first sentence only), and 15 of Plaintiffs' First Claim for Relief as though fully set forth at length herein.

VIII

OFFENSES CHARGED

23. Beginning at a date unknown to plaintiffs and continuing at least to the date of the filing of this complaint, defendants, and each of them, together with the co-conspirators, have engaged in a combination of capital and acts in the State of California, including Los Angeles County, in order to carry out the following purposes, among others:

(a) To create and carry out restrictions in trade and commerce; and

(b) To prevent and eliminate competition in the sale of hot asphalt oil and asphaltic concrete, in violation of California Business and Professions Code Section 16720 (also known as the Cartwright Act).

24. Plaintiffs hereby incorporate by reference Paragraphs 18(a) and (b) and 19(a) through (m) of Plaintiffs' First Claim for Relief as though fully set forth at length herein.

IX

INJURY TO PLAINTIFFS

25. By reason of the aforesaid violations of the Cartwright Act, plaintiffs have suffered grave damage in loss of profits, good will, and the value of their Company as a going concern. The exact amount of damage has not yet been fully ascertained. When fully determined, plaintiffs will seek to assert the amount of damages herein.

PRAYER

Wherefore, plaintiffs pray that:

(1) The alleged combination and conspiracy among the defendants herein named be adjudged and decreed as a violation of Section 1 of the Sherman Act;

(2) That the attempts to monopolize, conspiracy to monopolize and monopolization hereinabove alleged be declared to be a violation of Section 2 of the Sherman Act;

(3) That the sales at discriminatory prices hereinabove alleged be declared to be in violation of Section 2 of the Clayton Act of 1914 as amended by the Robinson-Patman Act of 1936;

(4) That the tie-in arrangements hereinabove alleged be declared to be in violation of Section 3 of the Clayton Act;

(5) That the acquisition by defendant Gulf of the capital stock of Industrial, and the acquisition by defendant Union of the capital stock of defendant Sully Miller, and the various acquisitions of hot plants, by Industrial and Sully Miller, be adjudged to be in violation of Section 7 of the Clayton Act;

(6) That defendant Union be required to divest itself of the capital stock of Sully Miller and that defendant Gulf be required to divest itself of the capital stock of Industrial;

(7) That the combination and conspiracy hereinabove alleged be declared to be in violation Section 16720 of the California Business and Professions Code and the Cartwright Act;

(8) That defendants, and all persons, firms and corporations acting on their behalf or under their direction or control, be permanently enjoined from engaging in carrying out or renewing any contracts, agreements, practices or understandings hereinabove alleged;

(9) That judgment be entered in favor of plaintiffs and against the defendants, jointly and severally, for the injury and damages caused plaintiffs in an amount equal to threefold the actual damages sustained by plaintiffs;

(10) That plaintiffs recover their costs of litigation, including reasonable attorneys' fees; and

(11) That plaintiffs be accorded such other, further and different relief as the nature of the case may require and as may seem just and proper to the Court.

CORINBLIT AND SHAPERO

By: MARTIN M. SHAPERO
Attorneys for Plaintiffs

PLAINTIFFS DEMAND A JURY TRIAL

United States District Court for the Central District of California

[Title of case omitted in printing]

[Filed February 26, 1971]

ANSWER OF DEFENDANT UNION OIL COMPANY OF CALIFORNIA TO AMENDED COMPLAINT

Union Oil Company of California, hereafter "Union," answers plaintiffs' amended complaint as follows:

ANSWER TO FIRST CLAIM FOR RELIEF

1. Union denies the averments of Paragraph 1 of the amended complaint, except that it admits that plaintiffs' first claim for relief purports to be filed under the provisions of 15 U.S.C. § 26.

2. Union is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 2 of the amended complaint, except that it admits that Union, Sully-Miller Contracting Company, Industrial Asphalt, Inc., and Edgington Oil Company each maintains an office, transacts business or is found in the Central District of California, and denies that Union has done or performed any acts in violation of or pursuant to any violations of Sections 1 and 2 of the Sherman Act in the Central District of California or in any other place.

3. Union is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraphs 3, 4, and 5 of the amended complaint except that it admits that Industrial Asphalt, Inc. operates "hot plants" for the manufacture of asphaltic concrete.

4. Union admits the averments of Paragraph 6 of the amended complaint, except that it denies that it produces and refines crude petroleum and markets petroleum products throughout the United States, and denies that it refines crude petroleum and markets petroleum products in foreign countries.

5. Union admits the averments of Paragraph 7 of the amended complaint, except that it denies that it obtained control of Sully-Miller Contracting Company in 1964 or at any other time.

6. Union is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 8 of the amended complaint, except that it admits that Edgington Oil Company is a California corporation with its principal place of business in Long Beach, California, and that Edgington Oil Company refines crude petroleum and markets petroleum products in California.

7. Union denies the averments of Paragraph 9 of the amended complaint.

8. Union is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 10 of the amended complaint, except that it admits that various products, sometimes referred to collectively as "hot asphalt oil" are obtained from the refining of crude petroleum, in some cases domestic and in other cases foreign, that "hot asphalt oil" is used in connection with the construction, maintenance, surfacing, resurfacing, and repairing of roads and highways, and that asphaltic concrete paving materials are made by combining "hot asphalt oil" with various other materials and by various methods in a mixing plant, sometimes called a "hot plant."

9. Union is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraphs 11, 12, and 13 of the amended complaint, except that it admits that the total annual production and importation of "hot asphalt oil" into the United States ordinarily amounts to more than six million tons, that approximately 14 million or more square yards of asphalt pavement are ordinarily constructed annually in the United States, and that the total annual production of "hot asphalt oil" in California ordinarily exceeds one million tons per year.

10. Union is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 14 of the amended complaint, except that it admits that it operates refineries within the State of California at which "hot asphalt oil" is manufactured from crude petroleum, in some cases domestic and in other cases foreign, that Edington operates a refinery in the State of California at which "hot asphalt oil" is manufactured from crude petroleum, that Union ships some of the "hot asphalt oil" so manufactured by it to other states of the United States and sells "hot asphalt oil" to customers located in other states, that Industrial and Sully-Miller purchase "hot asphalt oil" produced from crude petroleum, in some cases domestic and in other cases foreign, and manufacture asphaltic concrete therefrom, that Union and Edington sell "hot asphalt oil" to end users and contractors, and that such "hot asphalt oil" is in some cases used as "hot asphalt" and is in other cases used as one of the constituents of asphaltic concrete for constructing, maintaining, surfacing, resurfacing, and repairing of roads and highways, including federal interstate system highways and highways directly connected to interstate highways, and denies that it sells, or during at least the four years last past has sold "hot asphalt oil" to plaintiffs or to any of them, and denies that the business of supplying "hot asphalt oil" or asphaltic concrete for road purposes is in and directly affects interstate commerce.

11. Union is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 15 of the amended complaint.

12. Union denies the averments of Paragraphs 16, 17, 18, 19, and 20 of the amended complaint, except that it admits that the exact amount by which plaintiffs have allegedly been damaged has not been ascertained or determined, and alleges that said supposed amount cannot be ascertained or determined because plaintiffs have not been injured at all.

SECOND DEFENSE TO FIRST CLAIM FOR RELIEF

13. Plaintiffs' first claim for relief fails to state a cause of action against Union upon which relief may be granted.

THIRD DEFENSE TO FIRST CLAIM FOR RELIEF

14. Such of plaintiffs' claims for relief against Union as accrued more than four years prior to the filing of the complaint are barred by the statute of limitations, the Act of July 7, 1955, C. 283, § 1, 69 Stat. 283, 15 U.S.C. § 156.

FOURTH DEFENSE TO FIRST CLAIM FOR RELIEF

15. Any differentials in the prices at which Union sold "hot asphalt oil" of like grade and quality to persons of the same class of trade made only due allowance for differences in the cost of manufacture, sale, furnishing or delivery resulting from the different methods or quantities in which the "hot asphalt oil" was sold, delivered or furnished to purchasers.

FIFTH DEFENSE TO FIRST CLAIM FOR RELIEF

16. Any changes in the prices at which Union sold "hot asphalt oil" of like grade and quality to persons of the same class of trade were in response to changing conditions affecting the market for or the marketability of the "hot asphalt oil" concerned.

SIXTH DEFENSE TO FIRST CLAIM FOR RELIEF

17. Any differentials in the prices at which Union sold "hot asphalt oil" of like grade and quality to persons of the same class of trade were made in good faith to meet the equally low price of a competitor or competitors of Union or the services or facilities furnished by a competitor or competitors of Union.

ANSWER TO SECOND CLAIM FOR RELIEF

18. Union denies the averments of Paragraph 21 of the amended complaint, except that it admits that plaintiffs' second claim for relief purports to arise under Section 16750 of the California Business and Professions Code.

19. Answering Paragraph 22 of the amended complaint, Union incorporates by this reference Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of Answer to First Claim for Relief as though the same were fully set forth at length herein.

20. Union denies the averments of Paragraph 23, 24, and 25 of the amended complaint, except that it admits that the exact amount by which plaintiffs have allegedly been damaged has not been ascertained or determined, and alleges that said supposed amount cannot be ascertained or determined because plaintiffs have not been injured at all.

SECOND DEFENSE TO SECOND CLAIM FOR RELIEF

21. Plaintiffs' second claim for relief fails to state a cause of action against Union upon which relief may be granted.

THIRD DEFENSE TO SECOND CLAIM FOR RELIEF

22. Such of plaintiffs' claims for relief against Union as accrued more than four years prior to the filing of the complaint are barred by the statute of limitations, Stats. 1963 c. 792, California Business and Professions Code. § 16750.1.

FOURTH DEFENSE TO SECOND CLAIM FOR RELIEF

23. This Court has no jurisdiction over the subject matter of the claims purportedly asserted in plaintiffs' second claim for relief.

Wherefore, defendant Union Oil Company of California prays that the amended complaint be dismissed and that it have and recover its costs.

Dated: February 25, 1971.

DOUGLAS C. GREGG
E. A. MCFADDEN
MOSES LASKY
RICHARD HAAS
GEORGE A. CUMMING, JR.
BROBECK, PHLEGER & HARRISON

By /s/ RICHARD HAAS
Richard Haas

Attorneys for Defendant
Union Oil Company of California

[Certificate of Service omitted in printing]

United States District Court for the Central District of California

[Title of case omitted in printing]

[Filed February 26, 1971]

ANSWER OF DEFENDANT SULLY-MILLER CONTRACTING COMPANY TO AMENDED COMPLAINT

Sully-Miller Contracting Company, hereafter "Sully-Miller," answers plaintiffs' amended complaint as follows:

ANSWER TO FIRST CLAIM FOR RELIEF

1. Sully-Miller denies the averments of Paragraph 1 of the amended complaint, except that it admits that plaintiffs' first claim for relief purports to be filed under the provisions of 15 U.S.C. § 26.

2. Sully-Miller is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 2 of the amended complaint, except that it admits that Union Oil Company of California, Sully-Miller Contracting Company, Industrial Asphalt, Inc., and Edgington Oil Company each maintains an office, transacts business or is found in the Central District of California, and denies that it has done or performed any acts in violation of or pursuant to any violations of Sections 1 and 2 of the Sherman Act in the Central District of California or in any other place.

3. Sully-Miller is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraphs 3, 4, and 5 of the amended complaint, except that it admits that Copp Paving Company, Inc. has its principal place of business in Artesia, California, and is engaged in the business of manufacturing and selling asphaltic concrete and in the business of grading

and paving streets with asphaltic concrete, and that Industrial Asphalt, Inc. operates "hot plants" in various places for the manufacture of asphaltic concrete.

4. Sully-Miller is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 6 of the amended complaint, except that it admits that Union Oil Company of California is a California corporation with its principal place of business in Los Angeles, California, that Union produces and refines crude petroleum and markets petroleum products in, among other places, the Central District of California.

5. Sully-Miller admits the averments of Paragraph 7 of the amended complaint, except that it denies that Union obtained control of Sully-Miller in 1964 or at any other time.

6. Sully-Miller is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 8 of the amended complaint, except that it admits that Edgington Oil Company has its principal place of business in Long Beach, California, and that Edgington Oil Company refines crude petroleum and markets petroleum products in California.

7. Sully-Miller denies the averments of Paragraph 9 of the amended complaint.

8. Sully-Miller is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 10 of the amended complaint, except that it admits that various products, sometimes referred to collectively as "hot asphalt oil," are obtained from the refining of crude petroleum, in some cases domestic and in other cases foreign, that "hot asphalt oil" is used in connection with the construction, maintenance, surfacing, resurfacing and repairing of roads and highways, and that asphaltic concrete paving materials are made by combining "hot asphalt oil" with various other materials and by various methods in a mixing plant, sometimes called a "hot plant."

9. Sully-Miller is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraphs 11, 12, and 13 of the amended complaint, except that it admits that approximately 14 million or more square yards of asphalt pavement are ordinarily constructed annually in the United States.

10. Sully-Miller is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 14 of the amended complaint, except that it admits that Union and Edgington operate refineries in the State of California at which "hot asphalt oil" is manufactured, that Copp Paving Company, Inc., Industrial, and Sully-Miller purchase "hot asphalt oil" and manufacture asphaltic concrete therefrom, that Union and Edgington sell "hot asphalt oil" to end users and contractors, and that such "hot asphalt oil" in some cases is used as "hot asphalt," and in other cases is used as one of the constituents of asphaltic concrete for constructing, maintaining, surfacing, resurfacing, and repairing roads and highways, including Federal interstate system highways and highways directly connected to interstate highways, and denies that the business of supplying "hot asphalt oil" or asphaltic concrete is in and directly affects interstate commerce.

11. Sully-Miller is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 15 of the amended complaint, except that it admits that Copp Paving Company, Inc. purchases "hot asphalt oil" and manufactures asphaltic concrete therefrom at a "hot plant" located in Santa Fe Springs, California, that Copp Paving Company, Inc. sells asphaltic concrete to third parties or uses asphaltic concrete in the business of installing, maintaining and repairing of roads and highways, and that in some instances Copp Paving Company, Inc. competes with Industrial and Sully-Miller in the business of selling asphaltic concrete and in the business of installing, maintaining and repairing roads and highways.

12. Sully-Miller denies the averments of Paragraphs 16, 17, 18, 19, and 20 of the amended complaint, except that it admits that the exact amount by which plaintiffs have allegedly been damaged has not been ascertained or determined, and alleges that said supposed amount cannot be ascertained or determined because plaintiffs have not been injured at all.

SECOND DEFENSE TO FIRST CLAIM FOR RELIEF

13. Plaintiffs' first claim for relief fails to state a cause of action against Sully-Miller upon which relief may be granted.

THIRD DEFENSE TO FIRST CLAIM FOR RELIEF

14. Such of plaintiffs' claims for relief against Sully-Miller as accrued more than four years prior to the filing of the complaint are barred by the statute of limitations, the Act of July 7, 1955, C. 283, §1, 69 Stat. 283, 15 U.S.C. §156.

FOURTH DEFENSE TO FIRST CLAIM FOR RELIEF

15. Any differentials in the prices at which Sully-Miller sold asphaltic concrete of like grade and quality to persons of the same class of trade made only due allowances for differences in the cost of manufacture, sale, furnishing, or delivery resulting from the different methods or quantities in which the asphaltic concrete was sold, delivered or furnished to purchasers.

FIFTH DEFENSE TO FIRST CLAIM FOR RELIEF

16. Any changes in the prices at which Sully-Miller sold asphaltic concrete of like grade and quality to persons of the same class of trade were in response to changing conditions affecting the market for or marketability of the asphaltic concrete concerned.

SIXTH DEFENSE TO FIRST CLAIM FOR RELIEF

17. Any differentials in the prices at which Sully-Miller sold asphaltic concrete of like grade and quality to persons of the same class of trade were made in good faith to meet the equally low price of a competitor or competitors of Sully-Miller or the services or facilities furnished by a competitor or competitors of Sully-Miller.

ANSWER TO SECOND CLAIM FOR RELIEF

18. Sully-Miller denies the averments of Paragraph 21 of the amended complaint, except that it admits that plaintiffs' second claim purports to arise under Section 16750 of the California Business and Professions Code.

19. Answering Paragraph 22 of the amended complaint, Sully-Miller incorporates by this reference Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of Answer to First Claim for Relief as though the same were fully set forth at length herein.

20. Sully-Miller denies the averments of Paragraphs 23, 24, and 25 of the amended complaint, except that it admits that the exact amount by which plaintiffs have allegedly been damaged has not been ascertained or determined, and alleges that said supposed amount cannot be ascertained or determined because plaintiffs have not been injured at all.

SECOND DEFENSE TO SECOND CLAIM FOR RELIEF

21. Plaintiffs' second claim for relief fails to state a cause of action against Sully-Miller upon which relief may be granted.

THIRD DEFENSE TO SECOND CLAIM FOR RELIEF

22. Such of plaintiffs' claims for relief against Sully-Miller as accrued more than four years prior to the filing of the complaint are barred by the statute of limitations, Stats. 1963 c. 792, California Business and Professions Code §16750.1.

FOURTH DEFENSE TO SECOND CLAIM FOR RELIEF

23. This Court has no jurisdiction over the subject matter of the claims purportedly asserted in plaintiffs' second claim for relief.

WHEREFORE, defendant Sully-Miller Contracting Company prays that the amended complaint be dismissed and that it have and recover its costs.

Dated: February 25, 1971.

DOUGLAS C. GREGG
E. A. MCFADDEN

MOSES LASKY
RICHARD HAAS
GEORGE A. CUMMING, JR.
BROBECK, PHLEGER & HARRISON

By /s/ RICHARD HAAS
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[Filed April 23, 1971]

United States District Court
Northern District of California

In re Consolidated Pretrial Proceedings in Western Liquid Asphalt Cases	Master File No. 50173-RES

This document relates to:

Copp Paving Company, Inc.; Copp Equipment Company, Inc.; and Ernest A. Copp *Plaintiffs,* v. Gulf Oil Company; Union Oil Company of California; Industrial Asphalt, Inc.; Sully-Miller Contracting Company; and Edgington Oil Company, *Defendants.*	Civil Action No. 70-1394-RES

AMENDED ANSWER OF DEFENDANTS GULF OIL CORPORATION AND INDUSTRIAL ASPHALT, INC.

Defendants GULF OIL CORPORATION ("Gulf"), erroneously named herein as "Gulf Oil Company", and INDUSTRIAL ASPHALT, INC. ("Industrial") answer plaintiffs' Amended Complaint, as follows:

FIRST DEFENSE

1. Admit that the First Claim For Relief in the Amended Complaint purports to be filed under the statutes referred to in Paragraph 1; deny each and every allegation of Paragraph 1 not herein expressly admitted.

2. Admit that answering defendants, Union Oil Company of California, Sully-Miller Contracting Company and Edgington Oil Company, transact business, maintain offices, and are found within the Central District of California; deny all of the allegations of Paragraph 2 not herein admitted insofar as they relate to these answering defendants and state they are without knowledge or information sufficient to form a belief as to the truth of the allegations insofar as they relate to any other defendants.

3. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3.

4. Admit the allegations of Paragraph 4, except allege that defendant Gulf Oil Corporation was incorporated under the laws of the State of Pennsylvania and has a place of business in Los Angeles, California.

5. Admit the allegations of Paragraph 5, except allege that defendant Industrial Asphalt, Inc. was incorporated under the laws of the State of Delaware, and that it is engaged primarily in the business of manufacturing and selling asphaltic concrete at "Hot Plants" which it operates and which are located in Orange County, Los Angeles County, Ventura County, San Luis Obispo County, San Bernardino County, Riverside County and San Diego County; further admit that Gulf Oil Corporation acquired all of the capital stock of Industrial Asphalt, Inc. in 1963; deny each and every allegation of Paragraph 5 not herein expressly admitted.

6. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 6.

7. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7.

8. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 8.

9. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 9 insofar as they relate to other corporations, firms and individuals not named as defendants in plaintiffs' Amended Complaint, or defendants other than these answering defendants; deny that answering defendants participated as co-conspirators in the violations of law alleged in the Amended Complaint.

10. Admit the allegations of Paragraph 10 except the allegations of the sentence of Paragraph 10 appearing at lines 25 to 27, inclusive, Page 4, and state they are without knowledge or information sufficient to form a belief as to the truth of the allegations of the sentence of Paragraph 10 appearing at lines 25 to 27, inclusive, Page 4.

11. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 11.

12. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 12.

13. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 13.

14. Admit that Gulf Oil Corporation owns and operates a petroleum refinery within the State of California at which "hot asphalt oil" is manufactured from domestic and imported crude petroleum; further admit that Industrial Asphalt, Inc. purchases

"hot asphalt oil" produced from imported and domestic crude petroleum which it uses in the manufacture of asphaltic concrete; allege that all of the "hot asphaltic oil" so manufactured by Gulf Oil Corporation is sold to Industrial Asphalt, Inc.; said sale being made within the State of California; deny the allegations of Paragraph 14 not herein admitted insofar as they relate to these answering defendants and state they are without knowledge or information sufficient to form a belief as to the truth of the allegations as to any other defendants.

15. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 15.

16. Deny the allegations of Paragraph 16.

17. Deny the allegations of Paragraph 17.

18. Deny the allegations of Paragraph 18.

19. Admit that Gulf Oil Corporation acquired all of the capital stock of Industrial Asphalt, Inc.; deny the allegations of Paragraph 19 not herein admitted insofar as they relate to these answering defendants and state they are without knowledge or information sufficient to form a belief as to the truth of the allegations as to any other defendants.

20. Deny the allegations of Paragraph 20 and further deny that plaintiffs have been injured or damaged financially or otherwise or at all as a result of any act or omission of these answering defendants.

SECOND DEFENSE

21. Admit that the Second Claim For Relief in the Amended Complaint purports to be filed under the statutes referred to in Paragraph 21; deny each and every allegation of Paragraph 21 not herein expressly admitted.

22. Answering Paragraph 22 these answering defendants hereby incorporate by reference Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14 and 15 of this Answer as though fully set forth at length herein.

23. Deny the allegations of Paragraph 23.

24. Answering Paragraph 24 these answering defendants hereby incorporate by reference Paragraphs 18 and 19 of this Answer as though fully set forth at length herein.

25. Deny the allegations of Paragraph 25 and further deny that plaintiffs have been injured or damaged financially or otherwise or at all as a result of any act or omission of these answering defendants.

THIRD DEFENSE

The First Claim For Relief in the Amended Complaint fails to state a claim against these answering defendants upon which relief can be granted.

FOURTH DEFENSE

The Second Claim For Relief in the Amended Complaint fails to state a claim against these answering defendants upon which relief can be granted.

FIFTH DEFENSE

Plaintiffs' alleged claims for relief are barred in whole or in part by applicable federal and state statute of limitations.

SIXTH DEFENSE

None of the sales mentioned in the First Claim For Relief in the Amended Complaint were made in interstate commerce, nor did they substantially affect interstate commerce.

SEVENTH DEFENSE

If there have been any sales of "hot asphalt oil" and asphaltic concrete by these answering defendants in such a manner as to

discriminate in price, as alleged in the Amended Complaint, such discriminations or differentials were such as to make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities were sold or delivered to purchasers.

EIGHTH DEFENSE

If there have been any sales of "hot asphalt oil" and asphaltic concrete by these answering defendants in such a manner as to discriminate in price, as alleged in the Amended Complaint, such discriminations or changes in price were in response to changing conditions affecting the market or the marketability of the commodities concerned.

NINTH DEFENSE

If there have been any sales of "hot asphalt oil" and asphaltic concrete by these answering defendants in such a manner as to discriminate in price, as alleged in the Amended Complaint, such discriminations or differentials were made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Wherefore, defendants pray that plaintiffs take nothing by their Amended Complaint, for their costs and expenses of suit

herein, and for such other and further relief as the Court may deem proper.

Dated: March 23, 1971.

R. W. CURTIS
R. W. FULLER
F. E. LAYMON
D. R. ARNETT

By /s/ FRED E. LAYMON
F. E. Laymon

Attorneys for Defendants Gulf Oil Corporation and Industrial Asphalt, Inc.

[Certificate of Service omitted in printing]

United States District Court for
The Northern District of California
[Title of case omitted in printing]
[Filed October 29, 1971]

AFFIDAVIT OF ERNEST A. COPP

State of California
County of Los Angeles—ss.

Ernest A. Copp, being first duly sworn, states:

1. The affiant is now and was at all times referred to herein the President and the controlling manager of Copp Paving Company, Inc., and Copp Equipment Company, Inc., and has spent the last 17 years of his life actively engaged in the paving and contracting business in the Los Angeles Basin.

2. This affidavit is directed to the affidavits of R. F. Molyneux and W. Duane Rash which have been submitted by the defendant and which in the opinion of the affiant contain material misstatement of facts as follows:

A. Referring to Paragraph 7 of the affidavit submitted by R. F. Molyneux wherein it states "in recent years, more than 10 firms have operated more than 45 hot plants in that portion of Los Angeles Basin served by Sully-Miller's hot plants." As further set forth in the affidavit of R. F. Molyneux at Paragraph 9 "the effective area of operation of most hot plants in the Los Angeles Basin is 5 to 15 miles from the plant. The result is that the firms engaged in the production and sale of asphaltic concrete vary from one town to the next, depending upon the location of their hot plant and the pit from which it is supplied with aggregate, and each hot plant in the Los Angeles Basin is thus little more than a neighborhood outlet for asphaltic concrete."

B. This affiant, Ernest A. Copp, states in the south portion of Los Angeles County during the recent years referred to by affiant Molyneux there were formerly 6 contractor-producers that owned and operated one to three hot plants. Of the total of these 6 in this southern area, three of said companies were acquired by Sully-Miller and Sully-Miller in turn was acquired by defendant Union Oil. Of the remaining companies in the southern area of the one to three hot plant category, two were acquired by the defendant Industrial Asphalt, which in turn is owned by the defendant Gulf Oil. This leaves the plaintiff Copp as the only independent producing contractor in the southern area owning one to three plants.

3. Referring to the Rash affidavit, Paragraph 3 thereof, wherein it states that Sully-Miller has operated a total of eleven hot plants during all or a portion of the period referred to in plaintiff's interrogatories, this affiant states as follows: Within the southern Los Angeles basin, there are approximately thirty hot plants. It is possible to enlarge the area of definition to include some forty-five hot plants, but this affiant believes it is more realistic to define the area as confined to the south Los Angeles basin, which involves the thirty hot plants. Of the thirty hot plants in the area, Sully-Miller owns twelve hot plants and Industrial Asphalt owns eleven, which mathematically computes out as follows: That defendant Sully-Miller and Industrial Asphalt together own directly 76% of the hot plants within the south Los Angeles basin.

4. As alleged in the Copp amended complaint, the defendant Industrial Asphalt is owned by the defendant Gulf Oil Company. Within the course of the last ten years, the defendant Industrial Asphalt acquired the following companies. This list is set forth by way of illustration and is not intended to be a complete list of all paving companies acquired by Industrial Asphalt:

(a) Oswald Brothers—El Segundo
(b) A-1 Paving—Monrovia

(c) Hall Company—Monrovia
(d) Arrow—El Monte
(e) Ken Golden—San Diego
(f) Norwalk Asphalt—Santa Fe Springs
(g) C. O. Sparks—Los Angeles
(h) G. G. Fisher—South Gate
(i) Newhall Paving—Newhall
(j) Schroeder & Co.—Sun Valley
(k) Goode and Schroeder—Sun Valley
(l) Southwest Paving—Sun Valley
(m) Corona Plant—Corona
(n) John J. Swigart—Orange

5. The defendant Sully-Miller is owned and controlled by the defendant Union Oil Company. The defendant Sully-Miller has acquired the following paving companies within the last ten years:

(a) Ken Jones—Redondo Beach
(b) Warren Southwest—various locations
(c) Ansco—Long Beach
(d) S. P. Milling—Ventura

6. The companies remaining unacquired by Industrial Asphalt and Sully-Miller are:

(a) Vernon Paving
(b) Griffith Paving
(c) Associated Asphalt
(d) Hooker and Company
(e) Copp Paving Company
(f) R.J. Noble
(g) All American Asphalt

7. In addition to the foregoing there is the South Coast Asphalt Company which the affiant is informed and believes,

and based upon said information and belief alleges, is owned fifty percent by Sully-Miller or Union Oil and is controlled in terms of policy by Sully-Miller.

8. Of the total asphalt sold within the Los Angeles basin, it is estimated by this affiant that Industrial Asphalt accounts for fifty percent of the total sales and Sully-Miller accounts for thirty-three percent and the balance of seventeen percent is represented by the few independent contractors left within the area.

9. With reference to the question of trade secrets and procedures, the affiant states that he is well-acquainted with the production procedures and your affiant can state that there are no secret procedures. The equipment which is used on the jobs has progressively become larger and more efficient but the basic technique of paving has remained unchanged for many years. Trade secrets within the area are impossible for the following reasons:

(a) All contractors use the same union labor;

(b) The personnel used by the different companies drift back and forth between one company and another, depending upon the general movement of employment as well as fluctuation in demand between one company and another.

(c) All paving companies purchase utilities from the same utility companies;

(d) All paving contractors purchase the same brands and type of equipment for paving.

(e) All installations made are to specifications prescribed by the owner or the contracting governmental agency.

(f) The formula, including amounts and grade of material to be used in the installations, are common to all and designated by code or contract.

10. Because of the nature of the paving industry and the fact that there are no special techniques which are secret to one company over another, this affiant asserts that an examination of the

cost records of the defendants, Sully-Miller and Industrial Asphalt, will have no effect on the ability of said defendants to compete or place them in a disadvantageous position for future jobs. The sole and single reason for requesting this information from the defendants is to determine whether said defendants were actually pricing jobs in the area of competition with the plaintiff at a figure below their own costs of operation for the singular and designed purpose of preventing Copp from operating within his natural area of business and ultimately eliminating Copp as a competitor, while maintaining high prices beyond the point where the plaintiff Copp was competing, which areas would be defined beyond the limits set forth in the affidavit of affiant W. Duane Rash.

Dated: October 27, 1971.

/s/ ERNEST A. COPP
Ernest A. Copp

[Jurat and Certificate of Service Omitted in printing]

United States District Court
Northern District of California

[Filed December 31, 1971]

In Re Coordinated Pretrial Proceedings In Western Liquid Asphalt Cases	Master File No. 50173-RES
This Document Relates To: Copp Paving Company, Inc., et al., *Plaintiffs,* *v.* Gulf Oil Company, et al., *Defendants.*	No. C-71-608-RES

ORDER

Discovery in the above entitled cause is stayed until further order of the court except as herein specifically permitted.

All parties may join in and shall respond to all discovery being jointly pursued by the plaintiffs and defendants.

Each party shall immediately initiate a program of discovery designed to develop the facts bearing upon the question of whether the alleged conspiracy was one affecting interstate commerce. All requests for admission and all interrogatories directed to that issue shall be filed and served on or before January 20, 1972. All plaintiffs shall on or before January 20, 1972, send to defendants the names and addresses of the persons connected with plaintiffs who know the facts bearing upon the interstate commerce problem, and defendants shall each within the same time furnish a similar list. Either party wishing to take depositions bearing solely on the interstate commerce aspect of this case shall notice such depositions within ten (10) days following the receipt of the list and shall take the same within thirty (30) days following the receipt of

such list. It is contemplated that discovery on this issue will be completed by February 19, 1972. If defendants believe that a summary judgment on the interstate commerce point is proper they shall file a motion therefor not later than March 1, 1972, supported by a brief. Plaintiffs shall have twenty (20) days within which to respond.

DATED this 30th day of December, 1971.

/s/ RUSSELL E. SMITH
Russell E. Smith
United States District Judge

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Filed February 22, 1972]

ANSWERS OF PLAINTIFFS COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., AND ERNEST A. COPP TO DEFENDANTS' THIRD SET OF INTERROGATORIES PROPOUNDED TO PLAINTIFFS

Plaintiffs Copp Paving Company, Inc., Copp Equipment Company, Inc., and Ernest A. Copp answer Defendants' Third Set of Interrogatories Propounded to Plaintiffs, as follows:

INTERROGATORY NO. 1:

State separately as to each plaintiff:

(a) whether he or it was engaged in the business of selling asphaltic concrete; and

(b) whether he or it was engaged in the highway construction business.

ANSWER TO INTERROGATORY NO. 1:

(a) Yes.

(b) Yes.

INTERROGATORY NO. 2:

State separately, as to each plaintiff, whether he or it purchased:

(a) liquid asphalt from any marketer thereof located outside California;

(b) aggregates from any marketer thereof located outside California;

(c) asphaltic concrete from any marketer thereof located outside California.

ANSWER TO INTERROGATORY NO. 2:

(a) Yes.

(b) Yes.

(c) Yes. By way of explanation of the foregoing, the items are purchased from marketers who, since they sell to plaintiff Copp, obviously sell in Southern California. This does not imply, however, that the same marketers do not have similar products which they sell outside the State of California.

INTERROGATORY NO. 3:

If the answer to Interrogatory 2, or any part thereof, is affirmative, state separately with respect to each such purchase, the following:

(a) When, where, from whom and by whom it was made;

(b) The product(s) and tonnage(s) involved and the approximate percentage of plaintiff's total purchases of that product for that year which it represented; and

(c) The locations from which and to which delivery was made.

ANSWER TO INTERROGATORY NO. 3:

This interrogatory has previously been answered. In our previous responses to interrogatories, we have supplied records of all of our purchases as per invoice. For example, all of the original liquid asphalt purchase invoices have been produced and copies of same are in the hands of the defendant. These invoices will show where, when and from whom each purchase was made, the product and tonnage involved and the location to which delivery was made.

INTERROGATORY NO. 4:

State separately, with respect to each plaintiff that was engaged in the business of selling asphaltic concrete, the following:

(a) The area or areas of California in which he or it engaged in such business and, if different, the area or areas of California served by his or its hot plant;

(b) Whether he or it sold asphaltic concrete for use outside California; and

(c) If the answer to (b) is affirmative, the following with respect to each such sale:

(1) When and to whom it was made, and where it was used;

(2) The product(s) and tonnage(s) involved, and the approximate percentage of plaintiff's total sales of that product for that year which it represented; and

(3) The locations from which and to which delivery was made.

ANSWER TO INTERROGATORY NO. 4:

(a) The general area in which the plaintiffs do business is the southern area of Los Angeles County, and generally confined within a 30-35 mile radius of the location of the plaintiffs' hot plant located in Artesia, California.

(b) No.

(c) Inapplicable.

INTERROGATORY NO. 5:

State separately, with respect to each plaintiff that was engaged in the highway construction business, the following:

(a) The area or areas of California in which he or it engaged in such business;

(b) Whether he or it performed any highway construction projects outside California; and

(c) If the answer to (b) is affirmative, the following with respect to each such project:

(1) When, where and for whom it was performed, and the general nature of the performance rendered;

(2) The total dollar amount received by plaintiff for his or its performance, and the approximate percentage of

plaintiff's total receipts from its highway construction business in that year which it represented; and

(3) If plaintiff furnished asphaltic concrete, liquid asphalt or aggregates in connection with the project, the product(s) and tonnage(s) so furnished, and the locations from which and to which delivery of each such product was made.

ANSWER TO INTERROGATORY NO. 5:

(a) The general area in which the plaintiffs were engaged in highway construction business was the southern area of Los Angeles County, and generally confined within a 30-35 mile radius of the location of the plaintiffs' hot plant located in Artesia, California.

(b) No.

(c) Inapplicable.

INTERROGATORY NO. 6:

With reference to the allegations of the amended complaint that defendants violated Section 1 of the Sherman Act by allegedly combining and conspiring to restrain trade and commerce in the business of selling asphaltic concrete and in the business of trading and paving roads and highways, state separately, as to each such business, the following:

(a) Whether plaintiffs contend that the alleged combination and conspiracy was entered into and carried on in the course of interstate trade and, if so, each fact on which this contention is based; and

(b) Whether plaintiffs contend that the alleged combination and conspiracy had a direct and substantial effect on interstate trade and commerce and, if so, each fact on which this contention is based.

ANSWER TO INTERROGATORY NO. 6:

(a) Yes. The facts upon which this contention is stated to be true are based in part upon the following:

(1) That the following facts are true as alleged in the plaintiffs' complaint:

"17. Beginning at a date unknown to plaintiffs and continuing at least to the date of the filing of this complaint, defendants, and each of them together with the co-conspirators, have engaged in a continuous agreement, combination, conspiracy and concert of action in the State of California, including the County of Los Angeles, and in other western states of the United States, in unreasonable restraint of interstate commerce and trade, in the sale of hot asphalt oil, asphaltic concrete, and in the business of grading and paving of roads and highways and the defendants, and each of them, have purposely and with deliberate and specific intent, attempted to monopolize, conspired with each other and the co-conspirators, to monopolize and did monopolize the aforesaid trade and commerce, all in violation of Sections 1 and 2 of the Sherman Act.

"18. One of the purposes and objectives of the aforesaid combination and conspiracy to restrain and the combination and conspiracy to monopolize, attempt to monopolize and monopolization has been the destruction and elimination of plaintiffs as a viable entity so that:

(a) Plaintiffs would be eliminated as a competitor of Industrial and Sully-Miller;

(b) Plaintiffs would be penalized for remaining as an independent competitor in the manufacture and sale of asphaltic concrete, and in the business of grading and paving highways and roads.

"19. In furtherance of the above-described violations of said Anti-trust laws, the defendants, and each of them, together with the co-conspirators, agreed to and in fact engaged, among other things, in the following acts and practices:

(a) Fixed, stabilized and maintained the prices at which hot asphalt oil would be sold to end users, including governmental agencies and to hot plant owners, including plaintiffs;

(b) Allocated and exchanged between each other supplies of crude petroleum and petroleum products, including, but not limited to supplies of hot asphalt;

(c) Fixed, stabilized and maintained the prices at which asphaltic concrete would be sold to end users, including governmental agencies, and to contractors;

(d) Eliminated competition and obtained and exercised monopoly power in the operation of hot plants and in the sale of asphaltic concrete by acquiring ownership and control of a substantial number of hot plants, including more than sixty percent (60%) of all of the hot asphalt plants operated in Southern California and in Los Angeles and Orange Counties;

(e) Allocated and divided, on a geographic basis and upon a customer basis, the outlets to whom hot asphalt oil and asphaltic concrete would be sold;

(f) Sold asphaltic concrete at unreasonably low prices in the areas in which they competed with plaintiffs and subsidized said unreasonably low prices by artificially maintaining prices in other areas in which plaintiffs did not compete;

(g) Sold and installed asphaltic concrete at or below cost in areas where plaintiffs competed with defendants and subsidized said sales by artificially maintaining higher prices in areas where plaintiffs did not compete;

(h) Threatened actual and potential customers of plaintiffs that unless they refrained from purchasing asphaltic concrete from plaintiffs in plaintiffs' area of competition, that said customers would be unable to obtain supplies of asphaltic concrete at a competitive price in other areas where said customers had no other source of supply other than defendants.

(i) Extended unreasonably advantageous credit terms to customers in order to preclude said customers from purchasing asphaltic concrete from any other suppliers, including plaintiffs;

(j) Required customers who were indebted to defendants to purchase all of their asphaltic concrete from said defendants upon threat of immediately enforcing the collection of outstanding debt, thereby precluding said customers from purchasing asphaltic concrete from other suppliers, including plaintiffs;

(k) Tied the sale of other commodities, including base rock material, and tied the availability of credit to the sale of asphaltic concrete so as to induce and require purchasers of asphaltic concrete to purchase their supply thereof from Sully-Miller and not to purchase their supply from third parties, including plaintiffs;

(l) Sold hot asphalt oil and asphaltic concrete in such a manner as to discriminate in price between purchasers of such commodities of like grade and quality where the effect of such discrimination was to substantially lessen competition and tended to create a monopoly;

(m) Gulf acquired all of the capital stock of Industrial, as hereinabove alleged, and the effect thereof may be substantially to lessen competition and to tend to create a monopoly, in violation of Section 7 of the Act of Congress of October 15, 1914, commonly known as the Clayton Act, 15 U.S.C., Section 18, as amended; and

(n) Union acquired all of the capital stock of Sully-Miller, as hereinabove alleged, and the effect of that acquisition may be substantially to lessen competition, and to tend to create a monopoly, in violation of Section 7 of the

Act of Congress of October 15, 1914, commonly known as the Clayton Act, 15 U.S.C., Section 18, as amended."

(2) That each of the defendants is engaged in interstate commerce in that their business is that of constructing and supplying materials for the construction of Federal roads and highways planned and controlled by the Federal Government, likewise financed by the Federal Government under the Streets and Highways Act of the United States Code Annotated, Title 23 §§ 104, et seq.

(3) The defendants are further engaged in interstate commerce by virtue of the fact that a substantial portion of the crude oil which is refined for purposes of producing the various petroleum products, including liquid asphalt, is brought into the State of California from foreign countries.

(4) The defendants are further engaged in interstate commerce by virtue of the fact that each of the defendants does business across state lines and does sell and transport across state lines the specific asphaltic products which are the subject of competition involving plaintiff Copp.

(b) Plaintiffs do contend that the alleged combination and conspiracy had a direct and substantial effect on interstate trade and commerce. It is plaintiffs' understanding that where there is a multi-state conspiracy as alleged and an agreement to divide up the markets between the various competitors on a geographic basis in order to avoid competition, this agreement and geographical division has and is presumed to have, a direct and substantial effect on interstate trade and commerce.

INTERROGATORY NO. 7:

With reference to the allegations of the amended complaint that defendants violated Section 2 of the Sherman Act by attempting to monopolize, conspiring to monopolize and monopolizing trade and commerce in the business of selling asphaltic concrete and in the business of grading and paving roads and highways, state separtely, as to each such business, the following:

(a) The geographic area or areas in which plaintiffs contend that defendants attempted to monopolize, conspired to monopolize and monopolized such business;

(b) The name and address of each person, firm or corporation that was engaged in such business in each area identified in response to (a);

(c) Whether plaintiffs contend that such alleged attempt or attempts to monopolize, conspiracy or conspiracies to monopolize, and monopolization or monopolizations occurred in the course of interstate commerce and, if so, each fact on which such contention is based; and

(d) Whether plaintiffs contend that such alleged attempt or attempts to monopolize, conspiracy or conspiracies to monopolize, and monopolization or monopolizations had a direct and substantial effect on interstate commerce and, if so, each fact on which such contention is based.

ANSWER TO INTERROGATORY NO. 7:

(a) The geographical areas in which it is contended the defendants attempted to monopolize, conspired to monopolize and monopolized were in the states of California, Oregon, Washington, Arizona, Nevada, and New Mexico. The names and addresses of each firm engaged in the areas described are all of the defendants named in the action. The plaintiff cannot at this time, with specificity, name the geographical areas which were assigned to each of the defendants for purposes of their exploitation to the exclusion of the other defendants.

(c) The answer is yes. The facts upon which said contentions are based are (1) the defendants acquire their crude petroleum across state lines. (2) The defendants and each of them ship their products across state lines. (3) The specific and primary business

of these defendants which relates to their areas of competition against the plaintiff Copp is "in commerce" in that the specific business or industry referred to is the paving of highways, and the highways concerned are to a substantial degree Federal or interstate highways.

(d) The attempts to monopolize, the conspiracy to monopolize, and the monopolization itself had a direct and substantial effect on interstate commerce. The monopoly we are describing is a geographical division of the market, and where such a territorial division occurs, there is a reduction in competition among the participants, and an effect on interstate commerce is presumed.

INTERROGATORY NO. 8:

With reference to the allegations in the amended complaint that defendants violated the Robinson Patman Act by allegedly engaging in price discrimination in the sale of liquid asphalt, state the following:

(a) The business or businesses as to which plaintiffs contend that the effect of such alleged price discrimination may be to substantially lessen competition and to tend to create a monopoly, and, with respect to each such business, each fact on which plaintiffs base their contention that such business was a line of interstate commerce;

(b) The geographic area or areas in which plaintiffs contend that the effect of such alleged price discrimination may be to substantially lessen competition or tend to create a monopoly;

(c) With respect to each business and geographic area identified in response to (a) and (b), the name and address of each person, firm or corporation who engaged in that business in that area; and

(d) Separately, with respect to each defendant who allegedly engaged in such price discrimination, each fact on which plaintiffs base their contention that that defendant:

(1) was engaged in interstate commerce; and

(2) engaged in such alleged price discrimination in the course of interstate commerce.

ANSWER TO INTERROGATORY NO. 8:

(a) The business or businesses where competition is substantially lessend are the businesses identified as the oil refiners whose business, among other things, is to produce liquid asphalt, and, secondarily, those businesses which are asphalt applicators and contractors. As to the first group, to wit, the refiners of liquid asphalt, they are in interstate commerce upon the following grounds:

(1) A substantial portion of the crude petroleum comes from across state lines;

(2) A substantial portion of the liquid asphalt products are shipped across state lines;

(3) A vast preponderance of liquid asphalt produced by the refiners is to be ultimately applied on interstate and Federal roads and highways which are "in commerce."

As to the contractors and dealers in liquid asphalt (as distinguished from the refiners of liquid asphalt) the plaintiffs base their contention that such businesses are in interstate commerce upon the fact that:

(1) They do business across state lines;

(2) They ship their product across state lines;

(3) A substantial portion of their work which is constructing highways is performed on interstate and Federal highways, which are by definition "in commerce."

(b) The geographic areas in which the price discrimination lessens competition and tends to create a monopoly is the area de-

fined as the western states, including California, Arizona, Nevada, New Mexico, Washington, and Oregon.

(c) The plaintiff cannot identify at this time the specific geographic areas which had been assigned by conspiratorial agreement to each of the defendants for its specific exploitation. Plaintiff is able to state at this time that approximately eighty-five per cent (85%) of the liquid asphalt business within Los Angeles County is controlled by two companies, to wit, Industrial Asphalt, which in turn is owned by Gulf Oil Company, and Sully-Miller, which in turn is owned by Union Oil. The exact tonnage or measured product which is sold is information within the knowledge of the defendants.

(d) The facts upon which plaintiffs contend the defendants were in interstate commerce is set forth in Answer to Interrogatory No. 8 (a) hereinabove. The two defendants who are in immediate and direct competition with the plaintiff are Sully-Miller and Industrial. Each of said defendants does business across state lines, and further, a substantial portion of their business is in the construction and maintenance of interstate and Federal highways, which is "in commerce." The specific way the price discrimination is carried out as between these two defendants and the balance of the industry is by the simple means of the parent company making liquid asphalt products available to the subsidiary company at a price substantially less than that available to independent asphalt contractors at large. For example, with Industrial Asphalt, Industrial purchases the total liquid asphalt production of the Gulf Oil Company at a price which both Gulf and Industrial refuse to disclose and then resell the product to the general industry likewise at a price which both Gulf and Union refuse to disclose. It is presumed by the plaintiff for purposes of this motion that Industrial sells their product at a price substantially higher than the price they purchase the same

product at and they are, therefore, given an automatic advantage over any competitor since the competitors are buying retail from Industrial, while Industrial is buying wholesale from Gulf.

INTERROGATORY NO. 9:

Answer Interrogatory 8 as though the words "liquid asphalt" used therein read "asphaltic concrete".

ANSWER TO INTERROGATORY NO. 9:

Interrogatory No. 9 has been answered in the Answer to Interrogatory No. 8 in that the two defendants, to wit, Industrial and Sully-Miller, are producers of asphaltic concrete, and further, that the asphaltic concrete is produced for the specific purpose of applying same to interstate and Federal highways, and a substantial portion of the business of each defendant is in the construction of the interstate and Federal highways.

INTERROGATORY NO. 10:

With reference to the allegations of the amended complaint that defendants violated Section 3 of the Clayton Act by allegedly entering into tying agreements in connection with the sale of asphaltic concrete, state the following:

(a) The business or businesses as to which plaintiffs contend that the effect of such alleged tying agreements may be to substantially lessen competition and tend to create a monopoly and, with respect to each such business, each fact on which plaintiffs base their contention that such business was a line of interstate commerce;

(b) The geographic area or areas in which plaintiffs contend that the effect of such alleged tying agreements may be to substantially lessen competition or tend to create a monopoly;

(c) With respect to each business and geographic area identified in response to (a) and (b), the name and address of each person, firm or corporation who engaged in that business in that area; and

(d) Separately, with respect to each defendant who allegedly entered into such tying agreements, each fact on which plaintiffs base their contention that that defendant:

(1) was engaged in interstate commerce; and

(2) entered into such alleged tying agreements in the course of interstate commerce.

ANSWER TO INTERROGATORY NO. 10:

The information requested in Interrogatory No. 10 has been supplied by the Answer to the previous interrogatory in that the two principal competitors of the plaintiff are owned by the defendants Gulf and Union. In all other respects, the answer to Interrogatory No. 10 is the same as the answer to Interrogatory No. 8.

INTERROGATORY NO. 11:

With reference to the allegations of the amended complaint that the acquisition, by defendant Gulf Oil Corporation, of all the capital stock of defendant Industrial Asphalt, Inc. was in violation of Section 7 of the Clayton Act, state the following:

(a) The business or businesses in which plaintiffs contend that the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly and, as to each such business, each fact on which plaintiffs base their contention that such business was a line of interstate commerce;

(b) The geographic area or areas in which plaintiffs contend that the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly;

(c) With respect to each such business and area identified in (a) and (b), the name and address of each person, firm or corporation engaged in that business in that area; and

(d) Each fact on which plaintiffs base their contention that Industrial Asphalt, Inc. was engaged in interstate commerce.

ANSWER TO INTERROGATORY NO. 11:

(a) The business or businesses in which the effect of such acquisitions to substantially lessen competition and create a monopoly is (1) in the refining business, (2) in the business of selling liquid asphalt, and (3) in the business of asphalt contracting. The fact upon which plaintiffs base their contention that the businesses are in interstate commerce are:

(1) that the crude petroleum crosses state lines;

(2) that the liquid asphalt is shipped across state lines;

(3) that the companies within the area of selling and distributing liquid asphalt and asphaltic products are doing business across state lines;

(4) that the asphaltic products are designed and used substantially for the construction and paving of interstate and Federal roads, and are therefore by definition "in commerce."

(b) The geographic area or areas are the western states including California, Arizona, Nevada, New Mexico, Washington, and Oregon.

(c) The names and addresses of each of the defendants are involved, but the plaintiff cannot identify with specificity the areas which each of the defendants have as their domain as a result of the division of the market.

(d) (1) That Industrial Asphalt maintains and owns plants in Arizona and Nevada;

(2) that Industrial Asphalt shipped across state lines on a daily basis to Arizona and Nevada.

(3) that Industrial Asphalt takes the total supply of its asphaltic products and, in effect, is the distributor on behalf of Gulf Oil of its asphaltic products;

(4) that a substantial portion of work performed by Industrial Asphalt is on interstate and Federal roads; and that said roads are by definition "in commerce."

INTERROGATORY NO. 12:

Answer Interrogatory 11 as though the words "Gulf Oil Corporation" used therein read "Union Oil Company of California", and as though the words "Industrial Asphalt, Inc." used therein read "Sully-Miller Contracting Company."

ANSWER TO INTERROGATORY NO. 12:

(a) Sully-Miller Contracting Company is owned by the Union Oil Company.

(b) Sully-Miller does business across state lines, including, but not limited to, transactions in Utah and Thailand.

(c) Sully-Miller's business is that of an asphalt contractor whose major business is the constructing and paving of highways, and a substantial portion of their work is upon interstate and Federal highways, which said work is "in commerce."

Dated: February 18, 1972.

Respectfully submitted,

CORINBLIT AND SHAPERO

By: /s/ MARTIN M. SHAPERO
Martin M. Shapero
Attorney for Plaintiffs

VERIFICATION

State of California

County of Los Angeles—ss.

Ernest A. Copp, first duly sworn, states:

I am the President of Copp Paving Company and Copp Equipment Company, and I am authorized to make this verification on behalf of said companies. I have read the foregoing Answers of Plaintiffs Copp Paving Company, Inc., Copp Equipment Company, Inc., and Ernest A. Copp to Defendants' Third Set Of Interrogatories Propounded to Plaintiffs, and the matters stated therein are true to the best of my knowledge, information and belief.

/s/ ERNEST A. COPP
Ernest A. Copp

[Jurat and Certificate of Service omitted in printing]

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Filed February 22, 1972]

RESPONSE OF DEFENDANT UNION OIL COMPANY OF CALIFORNIA TO PLAINTIFFS' INTERROGATORIES

Union Oil Company of California, hereafter "Union," responds to Interrogatories Propounded by Plaintiff Copp with Reference to the Issue of Interstate Commerce, dated January 19, 1972, as follows:

* * * *

INTERROGATORY NO. 10

With reference to the source of the crude oil which your company processes, state for each year from 1958 to date the source of said crude oil, and in said response set forth specifically:

A. The total amount of crude oil processed by your company within the State of California for each year in question. Set forth the number in terms of either gallons or barrels or the standard measurement which you may use at your refinery.

B. Set forth in the measurement used by you the amount of oil refined for each year which is obtained by your company, the origin of which was in the confines of the State of California.

C. Set forth in the measurement used by you the amount of oil refined for each year which is obtained by your company, the origin of which was outside of the confines of the State of California.

D. Set forth in the measurement used by you the amount of oil refined for each year which is obtained by your company, the origin of which was outside the confines of the continental United States.

RESPONSE TO INTERROGATORY NO. 10

Union objects to this interrogatory as to any period of time on the ground that information respecting the sources of crude oil processed by Union is irrelevant to the question whether the alleged antitrust activities in connection with the marketing of other products occurred in or affected interstate commerce. However, without waiving its objections to this interrogatory, and solely for purposes of moving this case along and avoiding a dispute over inconsequential matters, the information requested for the years 1966 through 1970 is set forth in Exhibit A hereto.

INTERROGATORY NO. 11

State the location of each refinery owned by your company within the State of California, identifying the period of time said refinery has been in existence from the years 1958 to date.

A. With reference to the refineries identified herein, set forth and state the capacity of each refinery in terms of the total crude oil processed by said refinery for each year, from 1958 to date.

B. State for each refinery the total amount of petroleum products produced by each refinery from 1958 to date, including gasoline, kerosene, motor oil, and liquid asphalt production. (The list requested is by way of example only, and if any other petroleum products are produced, you will set forth each and every other petroleum product so produced including quantity thereof.)

RESPONSE TO INTERROGATORY NO. 11

During all of the period June 24, 1966 to December 30, 1970, Union owned the following refineries in the State of California:

Los Angeles Refinery
Wilmington, California

San Francisco (Oleum) Refinery
Rodeo, California

Santa Maria Refinery
Arroyo Grande, California

The total amounts of crude oil processed by each such refinery during the years 1966 through 1970, and the total amounts of liquid asphalt produced at each such refinery during the years 1966 through 1970 are set forth in Exhibit B hereto. Except as so answered, Union objects to this interrogatory on the ground that information respecting petroleum products other than liquid asphalt is irrelevant.

INTERROGATORY NO. 12

For each of the petroleum products so identified in response to Interrogatory No. 11 hereinabove, state for each year in question the total volume of said product sold and distributed within the confines of the State of California.

A. For each of the petroleum products so identified in response to Interrogatory No. 11 hereinabove, state for each year in question the total volume of said product sold and distributed outside the confines of the State of California.

B. For each of the petroleum products so identified in response to Interrogatory No. 11 hereinabove, state for each year in question the total volume of said product sold and distributed outside the confines of the continental United States.

RESPONSE TO INTERROGATORY NO. 12

The total amounts of liquid asphalt sold by Union to customers located in these areas during the years 1966 through 1970 are set forth in Exhibit C hereto. However, the summary sales records from which these figures were taken include both sales of liquid asphalt produced in Union's California refineries and sales of liquid asphalt produced elsewhere. If plaintiffs wish to know only the amount of liquid asphalt sold by Union that was produced by it in its California refineries, it will be necessary to tabulate

this information from Union Form 625, Asphalt Report, and, pursuant to R.C.P. Rule 33(c), Union will make such records available if plaintiffs wish to perform this tabulation. Except as so answered, Union objects to this interrogatory on the ground that information respecting petroleum products other than liquid asphalt is irrelevant.

INTERROGATORY NO. 13

With reference to all crude oil which you have hereinabove identified as its origin being outside the confines of the State of California, identify the means by which you received said oil including a description of the specific boat lines if said oil was received by boat, or the specific railroad lines if said oil was received by rail.

RESPONSE TO INTERROGATORY NO. 13

During the period June 24, 1966 to December 30, 1970, all such crude oil was received by tankships, in some instances tankships owned or chartered by Union, and in other instances tankships owned or chartered by other operators, the specific names of whom cannot possibly be relevant to this case.

INTERROGATORY NO. 14

With reference to all petroleum products shipped outside the confines of the State of California by you, identify the means by which you shipped said oil including a description of the specific railroad lines if said oil was shipped by rail.

RESPONSE TO INTERROGATORY NO. 14

During the period June 24, 1966 to December 30, 1970, Union shipped liquid asphalt by tankships owned or chartered by Union and, occasionally, by various rail or truck common carriers, the specific names of whom cannot possibly be relevant to this case. Except as so answered, Union objects to this interrogatory on

the ground that information respecting the shipment of petroleum products other than liquid asphalt is irrelevant to this case.

INTERROGATORY NO. 15

With reference to liquid asphalt, set forth for each year from 1959 to the present, the total amount of liquid asphalt shipped to the states of:

A. Washington;
B. Oregon;
C. Nevada;
D. New Mexico.

RESPONSE TO INTERROGATORY NO. 15

The total amounts of liquid asphalt shipped by Union from its California refineries to its Edmonds, Washington and Portland, Oregon asphalt topping plants in the years 1966 through 1969 are set forth in Exhibit D hereto. However, in order to determine the total amounts shipped by Union to these states, it is necessary to add to the figures set forth in Exhibit D the amounts of liquid asphalt sold by Union to customers in these states that was shipped by Union from its California refineries to these customers. Such figures can be derived by tabulating the information contained in Union Form 625, Asphalt Report, and Union Form 605-T, Order/Invoice. Pursuant to R.C.P. Rule 33(c), Union will make such documents available if plaintiffs wish to perform this tabulation. In the case of shipments by Union to Nevada, the same tabulation must be performed. Union shipped no asphalt to New Mexico.

INTERROGATORY NO. 16

With reference to sales made within the State of California, set forth for the years 1958 to the present, the total amount of liquid asphalt sold in each county of the State of California.

INTERROGATORY NO. 17

With reference to the sale of liquid asphalt, identify for each year from 1958 to date, each company to whom you have sold liquid asphalt, setting forth by way of summary for each year the total amount of liquid asphalt sold to said individual company. (Listing, for example, the total amount of liquid asphalt sold by Gulf to Sully-Miller for the year 1965.)

RESPONSE TO INTERROGATORIES NOS. 16 AND 17

This information can only be derived by tabulating sales data contained in Union Form 625, Asphalt Report. Pursuant to R.C.P. Rule 33(c), Union will make such documents available if plaintiffs wish to perform this tabulation.

Dated: February 22, 1972.

Douglas C. Gregg
E. A. McFadden

Moses Lasky
Richard Haas
George A. Cumming, Jr.
Brobeck, Phleger & Harrison

By /s/ GEORGE A. CUMMING, JR.
George A. Cumming, Jr.

Attorneys for Defendant Union Oil Company of California

EXHIBIT A

Sources of Crude Oil Processed in Union's California Refineries, 1966-1970 (Bbls)

	California	Other U.S.	Foreign	Total
1966	61,691,830	None	2,445,335	64,137,165
1967	62,116,132	1,706,688	1,231,527	65,054,347
1968	57,268,214	10,625,447	873,010	68,766,671
1969	53,653,070	13,420,006	2,807,035	69,880,111
1970	51,679,237	10,720,427	1,698,087	64,097,751

EXHIBIT B

Crude Oil Processed and Liquid Asphalt Produced in Union's California Refineries, 1966-1970

Refinery & Year	Total Crude Processed (Bbls)	Total Asphalt Produced (Tons)
1966—Los Angeles	34,119,607	173,818
Santa Maria	11,292,692	41,071
San Francisco	18,724,866	137,296
1967—Los Angeles	33,427,793	173,464
Santa Maria	12,154,616	34,189
San Francisco	19,471,938	116,478
1968—Los Angeles	36,233,999	168,749
Santa Maria	12,543,723	42,437
San Francisco	19,988,949	119,881
1969—Los Angeles	37,106,852	163,787
Santa Maria	11,575,400	40,466
San Francisco	21,192,859	152,558
1970—Los Angeles	32,075,603	225,438
Santa Maria	10,631,171	40,651
San Francisco	21,390,997	161,334

EXHIBIT C

Sales of Liquid Asphalt by Union, 1966-1970 (Tons)

Year	California	Other U.S.	Foreign
1966	239,292	141,329	3,654
1967	218,354	121,870	3,799
1968	246,792	232,984	Not available
1969	269,157	262,964	2,044
1970	285,504	304,171	17,049

EXHIBIT D

Shipments of Liquid Asphalt by Union to Its Edmonds, Washington, and Portland, Oregon Asphalt Plants 1966-1970 (Tons)

Year	Edmonds	Portland
1966	75,194	—0—
1967	74,041	—0—
1968	—0—	17,032
1969	—0—	60,659
1970	11,291	84,337

VERIFICATION

State of California
County of Los Angeles—ss.

R. P. Van Zandt, first duly sworn, states:

I am an officer, to wit Assistant Secretary of Union Oil Company of California, a corporation, and am authorized to and make this vertification on behalf of said corporation. I have read the foregoing Response of Defendant Union Oil Company of California to Plaintiffs' Interrogatories, and the information stated therein is true, to the best of my knowledge, information and belief.

/s/ R. P. VAN ZANDT

[Jurat and Certificate of Service omitted in printing]

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Filed February 22, 1972]

RESPONSE OF DEFENDANT UNION OIL COMPANY OF CALIFORNIA TO PLAINTIFFS' REQUESTS FOR ADMISSIONS

Defendant Union Oil Company of California (hereafter "Union") responds to "Requests For Admissions Filed Pursuant to The Order Of Court Dated December 30, 1971, Relating To The Issue Of Interstate Commerce And Whether The Alleged Conspiracy Was One Affecting Interstate Commerce," dated January 19, 1972, as follows:

* * * *

REQUEST FOR ADMISSION NO. 3:

That the Federal Government contributes a portion of the cost of construction of certain public highways.

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

Union objects to this request, and to requests numbers 4 through 16, which are of a similar vein, on the ground that whether or not the Federal Government contributed money in connection with local highway construction projects, or whether the Federal Government required any particular kind of performance or behavior as a condition of its contribution, is irrelevant to the question of interestate commerce. However, without waiving this objection, and solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Union admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 4:

That the basis of such Federal participation is the Federal Aid Highway Act (23 U.S.C., Sections 101 through 141).

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Union admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 5:

That under the Federal Aid Highway Act referred to hereinabove, the Federal Government assumes up to ninety percent (90%) of the highway construction costs (23 U.S.C. 120) upon approval by the Secretary of Commerce of the plans and specifications submitted by the various state highway departments (23 U.S.C. Section 109).

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Union admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 6:

To qualify for contributions by the Federal Government the state must conform to standards set forth in the statute, such as vehicle weight and width limitations (23 U.S.C., Section 127), control of outdoor advertising (23 U.S.C., Section 131), creation of a highway safety program (23 U.S.C., Section 135), control of junk yards (23 U.S.C., Section 136).

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again,

solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Union admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 7:

That each project is subject to the inspection and approval of the Secretary of Transportation and was formerly under the control of the Secretary of Commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Union admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 8:

That all wages paid for laborers and mechanics employed by contractors or subcontractors on roads funded by the Federal Aid Highway Act are controlled by the Davis-Bacon Act (40 U.S.C., Section 276A) (23 U.S.C., Section 113).

RESPONSE TO REQUEST FOR ADMISSION NO. 8:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Union admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 9:

That small business enterprises are to be assisted by the Secretary insofar as feasible in obtaining contracts in order to encourage full and free competition under the Federal Aid Highway Act (23 U.S.C., Section 304).

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Union admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 10:

That any state declaring to avail itself of the provisions of the Federal Aid to Highway Act (Title 23, U.S.C. 101 et seq.) shall have a highway department which shall have adequate powers and be suitably equipped and organized to discharge to the satisfaction of the Secretary the duties required by the Act (23 U.S.C., Section 302).

RESPONSE TO REQUEST FOR ADMISSION NO. 10:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Union admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 11:

That the State of California has qualified to receive and does receive funds from the Federal Government pursuant to Title 23 U.S.C. Section 101 et seq., and assents specifically to the provisions of Title 23 of the United States Code relative to Federal aid and other cooperative highway work (Section 820, Streets and Highways Code of the State of California).

RESPONSE TO REQUEST FOR ADMISSION NO. 11:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Union admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 12:

That the State of California has apportioned ninety-eight and one-half percent (98½%) of the money received by it under the Federal Highway Act of 1950 for the improvement of county highways (Section 201, Streets and Highways Code of the State of California).

RESPONSE TO REQUEST FOR ADMISSION NO. 12:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Union admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 13:

That the plaintiff Copp, in order to perform work on county roads funded by the United States Government under the Federal Highway Aid Act (23 U.S.C. Section 101 et seq.) is required to comply with all the provisions of the executed order No. 11246, dated September 24, 1965.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over consequential matters, Union admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 14:

That the defendant Sully-Miller, in order to perform work on the county roads funded by the United States Government under the Federal Highway Aid Act (23 U.S.C., Section 101 et seq.), is required to comply with all the provisions of the executed order No. 11246, dated September 24, 1965.

RESPONSE TO REQUEST FOR ADMISSION NO. 14:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again,

solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Union admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 15:

That the defendant Industrial, in order to perform work on county roads funded by the United States Government under the Federal Highway Aid Act (23 U.S.C., Section 101 et seq.), is required to comply with all the provisions of the Executive Order No. 11246, dated September 24, 1965.

RESPONSE TO REQUEST FOR ADMISSION NO. 15:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Union admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 16:

Attached hereto and made a part hereof are a group of documents labeled Exhibit "A", 1 through 11 respectively. Does Sully-Miller admit the documents so identified as "A" 1 through 11 are true and correct photostatic documents submitted by Sully-Miller on or about the date, February 2, 1970, reflecting the compliance by Sully-Miller to Executive Order 11246.

RESPONSE TO REQUEST FOR ADMISSION NO. 16:

This request is not addressed to Union.

REQUEST FOR ADMISSION NO. 17:

That the defendant Gulf owns all the outstanding stock of the defendant Industrial.

RESPONSE TO REQUEST FOR ADMISSION NO. 17:

Admitted.

REQUEST FOR ADMISSION NO. 18:

That Union Oil owns all the stock of the defendant Sully-Miller.

RESPONSE TO REQUEST FOR ADMISSION NO. 18:

Admitted.

REQUEST FOR ADMISSION NO. 19:

That the defendant Union is engaged in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 19:

Union admits that, in some of its operations, it is engaged in interstate commerce, denies that, in other of its operations, it is so engaged, and specifically denies that it is or was engaged in interstate commerce when it sells or sold, to customers located in California, liquid asphalt refined in California.

REQUEST FOR ADMISSION NO. 20:

That the defendant Gulf is engaged in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 20:

Union admits that, in some of its operations, defendant Gulf is engaged in interstate commerce, denies that, in other of its operations, defendant Gulf is so engaged, and specifically denies that defendant Gulf is or was engaged in interstate commerce when defendant Gulf sells or sold, to customers located in California, liquid asphalt refined in California.

REQUEST FOR ADMISSION NO. 21:

That the defendant Edgington is engaged in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 21:

Union has made reasonable inquiry, but the information known to it is insufficient to enable it to admit or deny the matter stated in this request. Union is therefore without knowledge or information sufficient to permit it to truthfully admit or deny the matter stated.

REQUEST FOR ADMISSION NO. 22:

That the defendant Edgington ships some of the hot asphalt oil produced by it to other states of the United States, and sells hot asphalt oil to customers located in other states.

RESPONSE TO REQUEST FOR ADMISSION NO. 22:

Union admits that defendant Edgington sells hot asphalt oil to customers located in states other than California and has made a reasonable inquiry as to the remaining matter set forth in this request, but the information known to Union is insufficient to permit it to admit or deny the remaining matters stated. Union is therefore without knowledge or information sufficient to permit it to truthfully admit or deny that defendant Edgington ships some of the hot asphalt oil produced by it to other states of the United States.

REQUEST FOR ADMISSION NO. 23:

That the defendant Union ships some of the hot asphalt oil produced by it to other states of the United States, and sells hot asphalt oil to customers located in other states.

RESPONSE TO REQUEST FOR ADMISSION NO. 23:

Admitted.

REQUEST FOR ADMISSION NO. 24:

That the defendant Gulf ships some of the hot asphalt oil produced by it to other states of the United States, and sells hot asphalt oil to customers located in other states.

RESPONSE TO REQUEST FOR ADMISSION NO. 24:

Denied.

Dated: February 18, 1972.

Douglas C. Gregg
E. A. McFadden
Moses Lasky
Richard Haas
George A. Cumming, Jr.
Brobeck, Phleger & Harrison

By /s/ GEORGE A. CUMMING, JR.
George A Cumming, Jr.
Attorneys for Defendant Union Oil Company of California

[Certificate of Service omitted in printing]

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Filed February 22, 1972]

RESPONSE OF DEFENDANT SULLY-MILLER CONTRACTING COMPANY TO PLAINTIFFS' INTERROGATORIES

Sully-Miller Contracting Company, hereafter "Sully-Miller", responds to Interrogatories Propounded by Plaintiff Copp with Reference to the Issue of Interstate Commerce, dated January 19, 1972, as follows:

* * * *

INTERROGATORY NO. 18

List for each year from 1958 to date the total amount of liquid asphalt purchased by your organization.

INTERROGATORY NO. 19

With reference to liquid asphalt purchases set forth hereinabove, state for each year from 1958 to date by volume the total amount of asphalt purchased, identifying the company from which said purchases were made. (For example, Industrial will please state the total amount of liquid asphalt purchased from Union for the year 1965.)

RESPONSE TO INTERROGATORIES NOS. 18 AND 19

All the liquid asphalt purchased by Sully-Miller came from refineries located in California. During the years 1966 through 1970, these purchases were as follows:

Year	Vendor	Tons
1966	Edgington Oil Company	20,584
	Union Oil Company	93,898
	Total	114,482
1967	Chevron Asphalt Company	4,551
	Edgington Oil Company	8,277
	Union Oil Company	82,843
	Total	95,671
1968	Chevron Asphalt Company	4,413
	Edgington Oil Company	10,955
	Union Oil Company	97,493
	Total	112,861
1969	Chevron Asphalt Company	4,778
	Edgington Oil Company	7,597
	Union Oil Company	75,859
	Total	88,234
1970	Chevron Asphalt Company	6,816
	Edgington Oil Company	13,316
	Union Oil Company	83,219
	Total	103,351

Except as so answered, Sully-Miller objects to this interrogatory on the ground that the information called for is irrelevant.

INTERROGATORY NO. 20

Set forth the geographical location and address of each and every hot plant owned by you now and for each year from 1958 until present.

RESPONSE TO INTERROGATORY NO. 20

See Exhibit A hereto.

INTERROGATORY NO. 21

With reference to each hot plant so identified in previous Interrogatory No. 20, please state after identifying said hot plant how said hot plant was obtained; from whom was said hot plant obtained and what was the method by which said hot plant was acquired.

RESPONSE TO INTERROGATORY NO. 21

See Exhibit A hereto.

INTERROGATORY NO. 22

For each hot plant so identified for each year in question identify and state by volume the total amount of asphalt sold by you outside the confines of the State of California.

RESPONSE TO INTERROGATORY NO. 22

Sully-Miller sold no asphalt at all. If this interrogatory was intended to refer to asphaltic concrete, Sully-Miller sold no asphaltic concrete outside the confines of the State of California at any time.

INTERROGATORY NO. 23

With reference to each year from 1958 to the present, identify the total amount of asphalt sold in each county of the State of California. (For example, set forth for each year from 1958 to date the total amount of asphalt sold in Alpine County.)

RESPONSE TO INTERROGATORY NO. 23

Sully-Miller sold no asphalt at all. If this interrogatory was intended to refer to asphaltic concrete, all sales of asphaltic concrete by Sully-Miller were made either f.o.b. its various hot plants, all of which were located in Los Angeles and Orange Counties, California, or f.o.b. various jobsites, all of which were located in Los Angeles County, Orange County or counties contiguous thereto. Except as so answered, Sully-Miller objects to this interrogatory on the ground that the information called for is irrelevant.

INTERROGATORY NO. 24

Is it your contention that your company is not involved in interstate commerce?

RESPONSE TO INTERROGATORY NO. 24

Yes.

INTERROGATORY NO. 25

If the response to the foregoing question is to the effect that you are not involved in interstate commerce, is it your contention that your company must not abide by Executive Order No. 11246, which is described as the Equal Employment Opportunity Program?

RESPONSE TO INTERROGATORY NO. 25

Sully-Miller need not abide by Executive Order No. 11246 unless, in the exercise of its own business judgment, it chooses to do so. This is so because the Order applies only to contractors and subcontractors performing work on certain federally assisted construction projects, and if Sully-Miller chooses not to perform such work, the Order does not apply to Sully-Miller. Thus, whether or not Sully-Miller abides by the Order is irrelevant to the question of interstate commerce, because the Order is capable of reaching both those who are engaged in interstate commerce and those, like Sully-Miller, who are not so engaged.

INTERROGATORY NO. 26

Does your company comply with Executive Order No. 11246, as amended?

RESPONSE TO INTERROGATORY NO. 26

Yes, as a matter of its own business judgment, but whether or not Sully-Miller complies with the Order is irrelevant to the question of interstate commerce, for the reasons stated in Sully-Miller's response to Interrogatory No. 25.

INTERROGATORY NO. 27

Attached hereto and made a part hereof, marked Exhibit "B", is a letter bearing the date June 30, 1970, which purports to be

special instruction to bidders, prepared by the Board of Supervisors of the County of Los Angeles, State of California, under the direction of James S. Mize, Executive Officer and Clerk of the Board of Supervisors. Are you familiar with the requirements as set forth in Exhibit "B", and in this regard, does your company follow the policies as required by said instruction pursuant to Executive Order 11246, as amended?

RESPONSE TO INTERROGATORY NO. 27

Sully-Miller is familiar with these requirements and follows the policies referred to as a matter of its own business judgment, but whether or not it does so is irrelevant to the question of interstate commerce, for the reasons stated in Sully-Miller's response to Interrogatory No. 25.

Date: February 18, 1972.

Douglas C. Gregg
E. A. McFadden

Moses Lasky
Richard Haas
George A. Cumming, Jr.
Brobeck, Phleger & Harrison

By /s/ GEORGE A. CUMMING, JR.
George A. Cumming, Jr.
Attorneys for Defendant Sully-Miller Contracting Company

EXHIBIT A

HOT PLANTS OWNED BY SULLY-MILLER, 1958-1972

Name and Address	*Period Owned by Sully-Miller, Method of Acquisition, Etc.*
Orange Plant 6145 Santiago Canyon Rd. Orange, California	1958-1972. Constructed by Sully-Miller prior to 1958.
Huntington Beach Plant 7221 Ellis Street Huntington Beach, Calif.	1958-1972. Constructed by Sully-Miller prior to 1958.
Redondo Beach Plant 2901 182nd Street Redondo Beach, Calif.	1962-1969. Acquired through merger with Contractors Asphalt Sales Company.
Long Beach Plant 32nd & Walnut Long Beach, Calif.	1964-1972. Purchased from ANSCO Company.
El Monte Plant 5500 N. Peck Road El Monte, California	1965-1972. Acquired through merger with Valley Asphalt Sales Company.
Capristrano Plant 29261 Rosenbaum Road San Juan Capristrano, Calif.	1965-1972. Acquired through merger with Contractors Asphalt Products Company.
South Gate Plant 5625 Southern Ave. South Gate, Calif.	1965-1972. Acquired through merger with Contractors Asphalt Products Company.
Santa Ana Plant 2818 Barranca Santa Ana, Calif.	1965-1972. Constructed by Sully-Miller.
Torrance Plant 20900 S. Normandie Torrance, Calif.	1965-1972. Purchased from Warren Southwest Company.
Duarte Plant 1112 E. Meridian Duarte, Calif.	1965-1970. Purchased from Warren Southwest Company.
Inglewood Plant 441 Railroad Place Inglewood, Calif.	1966-1972. Physical equipment purchased from Warren Southwest Company at Palmdale, California and moved to Inglewood location on property leased by Sully-Miller.

VERIFICATION

State of California
County of Los Angeles—ss.

Robert K. MacGregor, first duly sworn, states:

I am an officer, to wit: President, of Sully-Miller Contracting Company, a corporation, and am authorized to and make this verification on behalf of said corporation. I have read the foregoing response of Defendant Sully-Miller Contracting Company to Plaintiffs' Interrogatories, and the information stated therein is true to the best of my knowledge, information and belief.

/s/ ROBERT K. MACGREGOR

[Jurat and Certificate of Service omitted in printing]

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Filed February 22, 1972]

RESPONSE OF DEFENDANT SULLY-MILLER CONTRACTING COMPANY TO PLAINTIFFS' REQUEST FOR ADMISSIONS

Defendant Sully-Miller Contracting Company (hereinafter "Sully-Miller") responds to "Requests for Admissions Filed Pursuant To The Order Of Court Dated December 30, 1971, Relating To The Issue Of Interstate Commerce And Whether The Alleged Conspiracy Was One Affecting Interstate Commerce," dated January 19, 1972, as follows:

* * * *

REQUEST FOR ADMISSION NO. 3:

That the Federal Government contributes a portion of the cost of construction of certain public highways.

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

Sully-Miller objects to this request, and to requests numbers 4 through 16, which are of a similar vein, on the ground that whether or not the Federal Government contributed money in connection with local highway construction projects, or whether the Federal Government required any particular kind of performance or behavior as a condition of its contribution, is irrelevant to the question of interstate commerce.

However, without waiving this objection, and solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Sully-Miller admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 4:

That the basis of such Federal participation is the Federal Aid Highway Act (23 U.S.C., Sections 101 through 141).

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 5:

That under the Federal Aid Highway Act referred to hereinabove, the Federal Government assumes up to ninety percent (90%) of the highway construction costs (23 U.S.C. 120) upon approval by the Secretary of Commerce of the plans and specifications submitted by the various state highway departments (23 U.S.C. Section 109).

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 6:

To qualify for contributions by the Federal Government the state must conform to standards set forth in the statute, such as vehicle weight and width limitations (23 U.S.C., Section 127), control of outdoor advertising (23 U.S.C., Section 131), creation of a highway safety program (23 U.S.C., Section 135), control of junk yards (23 U.S.C., Section 136).

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding

a dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 7:

That each project is subject to the inspection and approval of the Secretary of Transportation and was formerly under the control of the Secretary of Commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 8:

That all wages paid for laborers and mechanics employed by contractors or subcontractors on roads funded by the Federal Aid Highway Act is controlled by the Davis-Bacon Act (40 U.S.C., Section 276A) (23 U.S.C., Section 113).

RESPONSE TO REQUEST FOR ADMISSION NO. 8:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 9:

That small business enterprises are to be assisted by the Secretary insofar as feasible in obtaining contracts in order to encourage full and free competition under the Federal Aid Highway Act (23 U.S.C., Section 304).

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again,

solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 10:

That any state declaring to avail itself of the provisions of the Federal Aid to Highway Act, (Title 23, U.S.C. 101 et seq.) shall have a highway department which shall have adequate powers and be suitably equipped and organized to discharge to the satisfaction of the Secretary the duties required by the Act (23 U.S.C., Section 302).

RESPONSE TO REQUEST FOR ADMISSION NO. 10:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 11:

That the State of California has qualified to receive and does receive funds from the Federal Government pursuant to Title 23 U.S.C. Section 101 et seq., and assents specifically to the provisions of Title 23 of the United States Code relative to Federal aid and other cooperative highway work (Section 820, Streets and Highways Code of the State of California).

RESPONSE TO REQUEST FOR ADMISSION NO. 11:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 12:

That the State of California has apportioned ninety-eight and one-half percent (98½%) of the money received by it under the

Federal Highway Act of 1950 for the improvement of county highways (Section 201, Streets and Highways Code of the State of California).

RESPONSE TO REQUEST FOR ADMISSION NO. 12:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 13:

That the plaintiff Copp, in order to perform work on county roads funded by the United States Government under the Federal Highway Aid Act (23 U.S.C. Section 101 et seq.) is required to comply with all the provisions of the executed order No. 11246, dated September 24, 1965.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 14:

That the defendant Sully-Miller, in order to perform work on the county roads funded by the United States Government under the Federal Highway Aid Act (23 U.S.C., Section 101 et seq.), is required to comply with all the provisions of the executed order No. 11246, dated September 24, 1965.

RESPONSE TO REQUEST FOR ADMISSION NO. 14:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a

dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 15:

That the defendant Industrial, in order to perform work on county roads funded by the United States Government under the Federal Highway Aid Act (23 U.S.C., Section 101 et seq.), is required to comply with all the provisions of the Executive Order No. 11246, dated September 24, 1965.

RESPONSE TO REQUEST FOR ADMISSION NO. 15:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 16:

Attached hereto and made a part hereof are a group of documents labeled Exhibit "A", 1 through 11 respectively. Does Sully-Miller admit the documents so identified as "A" 1 through 11 are true and correct photostatic documents submitted by Sully-Miller on or about the date, February 2, 1970, reflecting the compliance by Sully-Miller to Executive Order 11246.

RESPONSE TO REQUEST FOR ADMISSION NO. 16:

Without waiving the objection to this request previously set forth in its Response to Request for Admission No. 3 and, again, solely for the purpose of moving this case along and avoiding a dispute over inconsequential matters, Sully-Miller admits that the matter set forth in this request is true.

REQUEST FOR ADMISSION NO. 17:

That the defendant Gulf owns all the outstanding stock of the defendant Industrial.

RESPONSE TO REQUEST FOR ADMISSION NO. 17:

Admitted.

REQUEST FOR ADMISSION NO. 18:

That Union Oil owns all the stock of the defendant Sully-Miller.

RESPONSE TO REQUEST FOR ADMISSION NO. 18:

Admitted.

REQUEST FOR ADMISSION NO. 19:

That the defendant Union is engaged in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 19:

Sully-Miller admits that, in some of its operations, defendant Union is engaged in interstate commerce, denies that, in other of its operations, defendant Union is so engaged, and specifically denies that defendant Union is or was engaged in interstate commerce when defendant Union sells or sold, to customers located in California, liquid asphalt refined in California.

REQUEST FOR ADMISSION NO. 20:

That the defendant Gulf is engaged in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 20:

Sully-Miller admits that, in some of its operations, defendant Gulf is engaged in interstate commerce, denies that, in other of its operations, defendant Gulf is so engaged, and specifically denies that defendant Gulf is or was engaged in interstate commerce when defendant Gulf sells or sold, to customers located in California, liquid asphalt refined in California.

REQUEST FOR ADMISION NO. 21:

That the defendant Edgington is engaged in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 21:

Sully-Miller has made reasonable inquiry, but the information known to it is insufficient to enable it to admit or deny the matter stated in this request. Sully-Miller is therefore without knowledge or information sufficient to permit it to truthfully admit or deny the matter stated.

REQUEST FOR ADMISSION NO. 22:

That the defendant Edgington ships some of the hot asphalt oil produced by it to other states of the United States, and sells hot asphalt oil to customers located in other states.

RESPONSE TO REQUEST FOR ADMISSION NO. 22:

Sully-Miller admits that defendant Edgington sells hot asphalt oil to customers located in states other than California and has made a reasonable inquiry as to the remaining matter set forth in this request, but the information known to Sully-Miller is insufficient to permit it to admit or deny the remaining matter stated. Sully-Miller is therefore without knowledge or information sufficient to permit it to truthfully admit or deny that defendant Edgington ships some of the hot asphalt oil produced by it to other states of the United States.

REQUEST FOR ADMISSION NO. 23:

That the defendant Union ships some of the hot asphalt oil produced by it to other states of the United States, and sells hot asphalt oil to customers located in other states.

RESPONSE TO REQUEST FOR ADMISSION NO. 23:

Admitted.

REQUEST FOR ADMISSION NO. 24:

That the defendant Gulf ships some of the hot asphalt oil produced by it to other states of the United States, and sells hot asphalt oil to customers located in other states.

RESPONSE TO REQUEST FOR ADMISSION NO. 24:

Denied.

Dated: February 18, 1972.

Douglas C. Gregg
E. A. McFadden
Moses Lasky
Richard Haas
George A. Cumming, Jr.
Brobeck, Phleger & Harrison

By /s/ GEORGE A. CUMMING, JR.
George A. Cumming, Jr.
Attorneys for Defendant Sully-Miller Contracting Company

[Certificate of Service omitted in printing]

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Filed February 23, 1972]

RESPONSE OF DEFENDANT GULF OIL CORPORATION TO PLAINTIFFS' INTERROGATORIES

Gulf Oil Corporation (hereinafter referred to as "Gulf") responds to Interrogatories Propounded by Plaintiff Copp with Reference to the Issue of Interstate Commerce, dated January 19, 1972, as follows:

* * * *

INTERROGATORY NO. 10.

With reference to the source of the crude oil which your company processes, state for each year from 1958 to date the source of said crude oil, and in said response set forth specifically:

A. The total amount of crude oil processed by your company within the State of California for each year in question. Set forth the number in terms of either gallons or barrels or the standard measurement which you may use at your refinery.

B. Set forth in the measurement used by you the amount of oil refined for each year which is obtained by your company, the origin of which was in the confines of the State of California.

C. Set forth in the measurement used by you the amount of oil refined for each year which is obtained by your company, the origin of which was outside of the confines of the State of California.

D. Set forth in the measurement used by you the amount of oil refined for each year which is obtained by your company, the origin of which was outside the confines of the continental United States.

RESPONSE TO INTERROGATORY NO. 10:

Gulf objects to this interrogatory on the grounds that the information sought is totally irrelevant to the issue raised as to whether or not the alleged acts of this defendant occurred in or had a substantial adverse effect upon interstate commerce. Without waiving its objections, however, Gulf has answered this interrogatory insofar as its available records permit for the years 1965 through 1970 in "Exhibit A," attached hereto.

INTERROGATORY NO. 11.

State the location of each refinery owned by your company within the State of California, identifying the period of time said refinery has been in existence from the years 1958 to date.

A. With reference to the refineries identified herein, set forth and state the capacity of each refinery in terms of the total crude oil processed by said refinery for each year, from 1958 to date.

B. State for each refinery the total amount of petroleum products produced by each refinery from 1958 to date, including gasoline, kerosene, motor oil, and liquid asphalt production. (The list requested is by way of example only, and if any other petroleum products are produced, you will set forth each and every other petroleum product so produced including quantity thereof.)

RESPONSE TO INTERROGATORY NO. 11:

At all times since October 1, 1965, Gulf has owned and operated one refinery in the State of California which is located in Santa Fe Springs, California. Gulf objects to this interrogatory to the extent that it seeks information pertaining to the production at said refinery of any product other than asphalt on the grounds that said interrogatory to that extent is irrelevant to the subject matter of this litigation and is not likely to lead to the discovery of relevant evidence. The production of liquid asphalt at Gulf's

Santa Fe Springs Refinery for the years 1965 through 1970, is set forth in "Exhibit A."

INTERROGATORY NO. 12.

For each of the petroleum products so identified in response to Interrogatory No. 11 hereinabove, state for each year in question the total volume of said product sold and distributed within the confines of the State of California.

A. For each of the petroleum products so identified in response to Interrogatory No. 11 hereinabove, state for each year in question the total volume of said product sold and distributed outside the confines of the State of California.

B. For each of the petroleum products so identified in response to Interrogatory No. 11 hereinabove, state for each year in question the total volume of said product sold and distributed outside the confines of the continental United States.

RESPONSE TO INTERROGATORY NO. 12:

Gulf objects to this interrogatory to the extent that it seeks information pertaining to products refined at Gulf's Santa Fe Springs Refinery other than liquid asphalt on the grounds that to that extent the information sought is irrelevant to the subject matter of this litigation and is not likely to lead to the discovery of relevant evidence. All of the liquid asphalt produced by Gulf at its Santa Fe Springs Refinery was sold by Gulf in Los Angeles County.

INTERROGATORY NO. 13.

With reference to all crude oil which you have hereinabove identified as its origin being outside the confines of the State of California, identify the means by which you received said oil including a description of the specific boat lines if said oil was

received by boat, or the specific railroad lines if said oil was received by rail.

RESPONSE TO INTERROGATORY NO. 13:

During the period October 1, 1965 to December 30, 1970, all such crude oil was received by Gulf by pipelines or tank ships.

INTERROGATORY NO. 14.

With reference to all petroleum products shipped outside the confines of the State of California by you, identify the means by which you shipped said oil including a description of the specific railroad lines if said oil was shipped by rail.

RESPONSE TO INTERROGATORY NO. 14:

Gulf objects to this interrogatory to the extent that it seeks information relating to products other than liquid asphalt on the grounds that such interrogatory is irrelevant. At no time since October 1, 1965 has Gulf shipped liquid asphalt outside the confines of the State of California.

INTERROGATORY NO. 15.

With reference to liquid asphalt, set forth for each year from 1959 to the present, the total amount of liquid asphalt shipped to the states of:

A. Washington;
B. Oregon;
C. Nevada;
D. New Mexico.

RESPONSE TO INTERROGATORY NO. 15:

The answer to this interrogatory is set forth in Gulf's Response to Interrogatory No. 14.

INTERROGATORY NO. 16.

With reference to sales made within the State of California, set forth for the years 1958 to the present, the total amount of liquid asphalt sold in each county of the State of California.

RESPONSE TO INTERROGATORY NO. 16:

Since October 1, 1965, all of Gulf's sales of liquid asphalt were made in Los Angeles County, California.

INTERROGATORY NO. 17.

With reference to the sale of liquid asphalt, identify for each year from 1958 to date, each company to whom you have sold liquid asphalt, setting forth by way of summary for each year the total amount of liquid asphalt sold to said individual company (listing, for example, the total amount of liquid asphalt sold by Gulf to Sully-Miller for the year 1965).

RESPONSE TO INTERROGATORY NO. 17:

Since October 1, 1965, all of Gulf's sales of liquid asphalt were made to Industrial Asphalt, a wholly owned subsidiary of Gulf.

Dated: February 18, 1972.

R. W. Curtis
F. E. Laymon
D. R. Arnett

By /s/ R. W. CURTIS
R. W. Curtis

Attorneys for Defendant Gulf Oil Corporation

GULF OIL CORPORATION
Santa Fe Springs Refinery
Analysis of Crude Charges
Years 1965-70 Inclusive

	YEAR					
	1965*	1966	1967	1968	1969	1970
Domestic Crude Charged/Bbls.	8,569,200	8,467,906	12,120,157	14,945,095	14,743,588	13,171,652
Foreign Crude Charged/Bbls.	7,656,078	7,213,086	4,555,248	2,173,124	2,240,412	4,364,238
Total Crude Charges/Bbls.	16,225,278	15,680,992	16,675,405	17,118,219	16,984,000	17,535,890
Asphalt Yield	1,073,368	1,118,607	1,214,946	1,366,261	1,265,605	1,370,316
Total Crude Processing Capacity MB/CD	45.0	45.0	45.0	46.9	47.9	48.8
Crude Charged by State/County						
Domestic/Bbls.						
a. California	7,626,344	7,486,426	9,819,799	11,507,503	10,482,928	8,971,339
b. Utah	942,856	981,480	2,300,358	3,437,592	4,260,660	4,200,313
Foreign/Bbls.						
a. Kuwait	4,642,346	3,880,101	2,000,859	1,227,527	974,757	2,005,225
b. Iran	—	—	722,405	390,444	—	—
c. Venezuela	3,013,732	2,437,000	—	491,402	307,979	696,872
d. Boliva	—	895,985	1,831,984	63,781	515,912	11,807
e. Indonesia	—	—	—	—	—	372,423
f. Columbia	—	—	—	—	441,764	1,277,911

Santa Fe Springs Refinery
WER/jan
2-08-72

*All figures for 1965 include the operations of Wilshire Oil Company of California during the year 1965 prior to its merger with Gulf Oil Corporation.

AFFIDAVIT OF R. W. CURTIS

State of California
County of Los Angeles—ss.

R. W. Curtis, being first duly sworn, deposes and says:

I am Regional Attorney for defendant Gulf Oil Corporation in the within action.

The foregoing answers to plaintiffs' interrogatories are true and correct to the best of my own knowledge.

Dated: February 18, 1972.

/s/ R. W. CURTIS
R. W. Curtis

[Jurat and Certificate of Service omitted in printing]

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Filed February 23, 1972]

RESPONSE OF DEFENDANT GULF OIL CORPORATION TO PLAINTIFFS' REQUESTS FOR ADMISSIONS

Defendant Gulf Oil Corporation (hereinafter referred to as "Gulf") responds to "Requests For Admissions Filed Pursuant To The Order Of Court Dated December 30, 1971, Relating To The Issue Of Interstate Commerce And Whether The Alleged Conspiracy Was One Affecting Interstate Commerce," dated January 19, 1972, as follows:

* * * *

REQUEST FOR ADMISSION NO. 3:

That the Federal Government contributes a portion of the cost of construction of certain public highways.

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 4:

That the basis of such Federal participation is the Federal Aid Highway Act (23 U.S.C., Sections 101 through 141).

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 5:

That under the Federal Aid Highway Act referred to hereinabove, the Federal Government assumes up to ninety percent (90%) of the highway construction costs (23 U.S.C. 120) upon

approval by the Secretary of Commerce of the plans and specifications submitted by the various state highway departments (23 U.S.C. Section 109).

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 6:

To qualify for contributions by the Federal Government the state must conform to standards set forth in the statute, such as vehicle weight and width limitations (23 U.S.C., Section 127), control of outdoor advertising (23 U.S.C., Section 131), creation of a highway safety program (23 U.S.C., Section 135), control of junk yards (23 U.S.C., Section 136).

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 7:

That each project is subject to the inspection and approval of the Secretary of Transportation and was formerly under the control of the Secretary of Commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 8:

That all wages paid for laborers and mechanics employed by contractors or subcontractors on roads funded by the Federal Aid

Highway Act is controlled by the Davis-Bacon Act (40 U.S.C., Section 276A) (23 U.S.C., Section 113).

RESPONSE TO REQUEST FOR ADMISSION NO. 8:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 9:

That small business enterprises are to be assisted by the Secretary insofar as feasible in obtaining contracts in order to encourage full and free competition under the Federal Aid Highway Act (23 U.S.C., Section 304).

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 10:

That any state declaring to avail itself of the provisions of the Federal Aid to Highway Act, (Title 23, U.S.C. 101 et seq.) shall have a highway department which shall have adequate powers and be suitably equipped and organized to discharge to the satisfaction of the Secretary the duties required by the Act (23 U.S.C., Section 302).

RESPONSE TO REQUEST FOR ADMISSION NO. 10:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 11:

That the State of California has qualified to receive and does receive funds from the Federal Government pursuant to Title 23

U.S.C. Section 101 et seq., and assents specifically to the provisions of Title 23 of the United States Code relative to Federal aid and other cooperative highway work (Section 820, Streets and Highways Code of the State of California).

RESPONSE TO REQUEST FOR ADMISSION NO. 11:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 12:

That the State of California has apportioned ninety-eight and one-half percent (98½%) of the money received by it under the Federal Highway Act of 1950 for the improvement of county highways (Section 201, Streets and Highways Code of the State of California).

RESPONSE TO REQUEST FOR ADMISSION NO. 12:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 13:

That the plaintiff Copp, in order to perform work on county roads funded by the United States Government under the Federal Highway Aid Act (23 U.S.C. Section 101 et seq.) is required to comply with all the provisions of the executed order No. 11246, dated September 24, 1965.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 14:

That the defendant Sully-Miller, in order to perform work on the county roads funded by the United States Government under

the Federal Highway Aid Act (23 U.S.C., Section 101 et seq.), is required to comply with all the provisions of the executed order No. 11246, dated September 24, 1965.

RESPONSE TO REQUEST FOR ADMISSION 14:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 15:

That the defendant Industrial, in order to perform work on county roads funded by the United States Government under the Federal Highway Aid Act (23 U.S.C., Section 101 et seq.), is required to comply with all the provisions of the Executive Order No. 11246, dated September 24, 1965.

RESPONSE TO REQUEST FOR ADMISSION NO. 15:

Without admitting the relevancy thereof, Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 16:

Attached hereto and made a part hereof are a group of documents labeled Exhibit "A", 1 through 11 respectively. Does Sully-Miller admit the documents so identified as "A" 1 through 11 are true and correct photostatic documents submitted by Sully-Miller on or about the date, February 2, 1970, reflecting the compliance by Sully-Miller to Executive Order 11246.

RESPONSE TO REQUEST FOR ADMISSION NO. 16:

This request is not addressed to Gulf.

REQUEST FOR ADMISSION NO. 17:

That the defendant Gulf owns all the outstanding stock of the defendant Industrial.

RESPONSE TO REQUEST FOR ADMISSION NO. 17:

Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 18:

That Union Oil owns all the stock of the defendant Sully-Miller.

RESPONSE TO REQUEST FOR ADMISSION NO. 18:

Gulf admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 19:

That the defendant Union is engaged in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 19:

This request is not directed at Gulf.

REQUEST FOR ADMISSION NO. 20:

That the defendant Gulf is engaged in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 20:

Gulf admits that in some of its activities it is engaged in interstate commerce; denies that in other of its activities it is engaged in interstate commerce; and specifically denies that it was engaged in interstate commerce when it made sales of liquid asphalt to Industrial Asphalt in Los Angeles County.

REQUEST FOR ADMISSION NO. 21:

That the defendant Edgington is engaged in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 21:

This request is not directed to Gulf.

REQUEST FOR ADMISSION NO. 22:

That the defendant Edgington ships some of the hot asphalt oil produced by it to other states of the United States, and sells hot asphalt oil to customers located in other states.

RESPONSE TO REQUEST FOR ADMISSION NO. 22:

This request is not directed to Gulf.

REQUEST FOR ADMISSION NO 23:

That the defendant Union ships some of the hot asphalt oil produced by it to other states of the United States, and sells hot asphalt oil to customers located in other states.

RESPONSE TO REQUEST FOR ADMISSION NO. 23:

This request is not directed to Gulf.

REQUEST FOR ADMISSION NO. 24:

That the defendant Gulf ships some of the hot asphalt oil produced by it to other states of the United States, and sells hot asphalt oil to customers located in other states.

RESPONSE TO REQUEST FOR ADMISSION NO. 24:

Gulf denies that it ships hot asphalt oil produced by Gulf in California to other states of the United States or that it sells hot asphalt oil to customers located in other states.

Dated: February 18, 1972.

R. W. Curtis
F. E. Laymon
D. R. Arnett

By /s/ R. W. CURTIS
R. W. Curtis
Attorneys for Gulf Oil Corporation

[Certificate of Service omitted in printing]

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Filed February 23, 1972]

RESPONSE OF DEFENDANT INDUSTRIAL ASPHALT, INC. TO PLAINTIFFS' INTERROGATORIES

Industrial Asphalt, Inc. (hereinafter referred to as "Industrial") responds to Interrogatories Propounded By Plaintiff Copp With Reference To The Issue of Interstate Commerce dated January 19, 1972, as follows:

* * * *

INTERROGATORY NO. 17

With reference to the sale of liquid asphalt, identify for each year from 1958 to date, each company to whom you have sold liquid asphalt, setting forth by way of summary for each year the total amount of liquid asphalt sold to said individual company. (Listing, for example, the total amount of liquid asphalt sold by Gulf to Sully-Miller for the year 1964.)

RESPONSE TO INTERROGATORY NO. 17

The information sought by this interrogatory for the years 1965 through 1970 is set forth in Exhibit "A" attached hereto. Prior to 1965 Industrial did not engage in the business of selling liquid asphalt.

INTERROGATORY NO. 18

List for each year from 1958 to date the total amount of liquid asphalt purchased by your organization.

RESPONSE TO INTERROGATORY NO. 18

The information sought by this interrogatory for the years 1964 through 1970 is set forth in Exhibit "B" attached hereto.

To the extent that information is sought for a period preceding 1964 Industrial objects on the grounds that such information is irrelevant.

INTERROGATORY NO. 19

With reference to liquid asphalt purchases set forth hereinabove, state for each year from 1958 to date by volume the total amount of asphalt purchased, identifying the company from which said purchases were made. (For example, Industrial will please state the total amount of liquid asphalt purchased from Union for the year 1965.)

RESPONSE TO INTERROGATORY NO. 19

See Exhibit "B".

INTERROGATORY NO. 20

Set forth the geographical location and address of each and every hot plant owned by you now and for each year from 1958 until present.

INTERROGATORY NO. 21

With reference to each hot plant so identified in previous Interrogatory No. 20, please state after identifying said hot plant how said hot plant was obtained; from whom was said hot plant obtained and what was the method by which said hot plant was acquired.

INTERROGATORY NO. 22

For each hot plant so identified for each year in question identify and state by volume the total amount of asphalt sold by you outside the confines of the State of California.

INTERROGATORY NO. 23

With reference to each year from 1958 to the present, identify the total amount of asphalt sold in each county of the State of California. (For example, set forth for each year from 1958 to date the total amount of asphalt sold in Alpine County).

RESPONSE TO INTERROGATORIES NOS. 20, 21, 22 and 23

Without conceding the relevancy of any of the information sought by these interrogatories, Exhibit "C" attached hereto sets forth a list of the hot plants owned and operated by Industrial on September 15, 1971, the method by which and/or from whom such plants were acquired. Industrial does not maintain records of its sales of asphaltic concrete on a county by county basis. At no time has any of the asphaltic concrete produced at any of the hot plants owned and operated by Industrial in either California, Arizona or Nevada been sold or shipped outside the states in which the plants were located. The total sales of asphaltic concrete from all of the plants owned and operated by Industrial in the State of California and the total sales of asphaltic concrete from the plants operated in Arizona and Nevada for the years 1964-1970 are set forth as follows:

Year	California	Phoenix	Las Vegas
		(Figures in tons)	
1964	4,486,414	5,301	
1965	3,979,938	59,491	
1966	5,023,815	133,407	
1967	4,057,766	156,108	
1968	5,080,068	224,232	
1969	5,241,280	187,107	21,344
1970	5,198,453	277,377	91,583

Industrial objects to these interrogatories to the extent that they seek information not contained in Industrial's responses thereto on the ground that said interrogatories to that extent are irrelevant and beyond the scope of the Court's Order of December 30, 1971.

INTERROGATORY NO. 24

Is it your contention that your company is not involved in interstate commerce?

RESPONSE TO INTERROGATORY NO. 24

Industrial avers that in some of its activities it is engaged in interstate commerce, denies that in other of its activities it is engaged in interstate commerce and specifically denies that it is engaged in interstate commerce when it sells liquid asphalt or asphaltic concrete to its customers located in California or asphaltic concrete to its customers located in Nevada and Arizona.

INTERROGATORY NO. 25

If the response to the foregoing question is to the effect that you are not involved in interstate commerce, is it your contention that your company must not abide by Executive Order No. 11246, which is described as the Equal Employment Opportunity Program?

RESPONSE TO INTERROGATORY NO. 25

Industrial does not contend that it need not comply with Executive Order No. 11246.

INTERROGATORY NO. 26

Does your company comply with Executive Order No. 11246, as amended?

RESPONSE TO INTERROGATORY NO. 26

Yes.

INTERROGATORY NO. 27

Attached hereto and made a part hereof, marked Exhibit "B" is a letter bearing the date June 30, 1970, which purports to be

special instruction to bidders, prepared by the Board of Supervisors of the County of Los Angeles, State of California, under the direction of James S. Mize, Executive Officer and Clerk of the Board of Supervisors. Are you familiar with the requirements as set forth in Exhibit "B", and in this regard, does your company follow the policies as required by said instruction pursuant to Executive Order No. 11246, as amended?

RESPONSE TO INTERROGATORY NO. 27

Yes.

Dated: February 18, 1972.

R. W. Curtis
F. E. Laymon
D. R. Arnett

By /s/ R. W. CURTIS
R. W. Curtis

Attorneys for Defendant Industrial Asphalt, Inc.

Exhibit A

INDUSTRIAL ASPHALT
LIQUID ASPHALT SALES
(In Tons)

	1965	1966	1967
A-1 Paving & Grading	730.00	597.54	575.99
Ansco Construction Co.	0.00	0.00	0.00
Arizona Refining Co.	10,259.00	9,580.13	13,047.20
Asphalt Products Corp.	2,382.00	3,000.80	116.36
Asphalt Service Co.	0.00	0.00	0.00
Baker, James S. Co.	454.00	0.00	0.00
Bish Contracting Co.	128.00	0.00	0.00
Caliente, City of Nevada	0.00	0.00	102.10
California, State of	159.00	704.74	12.89
Cash Sales	151.00	688.13	284.88
Clark County Nevada	0.00	0.00	0.00
Clark County Road Dept.	15.00	3,909.30	2,360.39
Clyde, W. W. & Co.	0.00	0.00	0.00
Consumers Oil Co.	83.00	115.53	64.34
Cooley Brothers Co.	56.00	1,436.41	153.59
Defense Construction Supply	0.00	748.28	161.04
Douglas Oil Co.	2,600.00	1,789.55	1,577.73
Edgington Oil Refineries	1,958.00	13,484.11	4,726.39
Edgington Oil—Oxnard	43.00	913.10	0.00
Emmett, Robert Const.	0.00	0.00	520.81
Ferry Bros.	0.00	0.00	0.00
Fontana Paving Co.	556.00	0.00	0.00
Ford & Beck, Inc.	520.00	0.00	0.00
Gilmore & Page	5.00	50.86	31.75
Glazier, Leon	0.00	0.00	113.07
Golden, Kenneth H. Co.	20,012.00	436.25	0.00
Golden Bear Oil Co.	190.00	0.00	0.00
Gramel Co., Inc.	7,901.00	2,859.07	0.00
Griffith Co.	451.00	0.00	199.83
Helms, R. L.	39.00	0.00	5,066.34
Hew Construction	0.00	0.00	162.03
Imperial County	0.00	0.00	2,834.08
Industrial Asphalt Hot Plants	55,409.00	131,464.07	123,186.74
Industrial Asphalt—Sacramento	8,602.00	0.00	0.00
Ingram, R. W. & Sons	0.00	0.00	0.00
Isbell Construction	3,324.00	0.00	0.00
Kiewit, Peter & Sons	61.00	0.00	0.00
Las Vegas Paving Co.	617.00	383.58	176.78
Lincoln County Nevada	0.00	0.00	150.19
Loel, Dick	0.00	12.80	212.03
Los Angeles, City of	577.00	10.36	28.86
Los Angeles, County of	287.00	270.83	68.28

	1965	1966	1967
Matich Corporation	9,180.00	13,039.89	12,493.53
Merrett, James C.	161.00	101.71	0.00
Miller, D. J. & Son	395.00	0.00	0.00
Mineral County Nevada	0.00	737.66	0.00
Miscellaneous (Customers under 100 Tons)	942.19	1,437.64	2,041.02
Murphy Bros.	29.00	0.00	0.00
Nelson Bros.	0.00	183.65	0.00
Nevada State Div. of Hwys.	0.00	5,303.62	3,059.12
Newhall Refining Co.	2,067.00	2,466.09	2,106.02
Noble, R. J.	0.00	0.00	0.00
O'Brien Asphalt Maint.	5.00	268.45	419.29
Orange, County of Calif.	0.00	0.00	488.30
Parker, Charles T. Co.	482.00	4,062.58	7,872.73
RMK—BRJ	0.00	6,034.10	0.00
Raley, Wm. H. Co.	826.00	1,588.30	2,027.49
Reynolds Elect. & Eng. Co.	1,357.00	911.00	1,033.30
Riverside, County of Calif.	0.00	0.00	1,806.13
Rockwin Concrete Co.	0.00	302.60	0.00
Saint George, City of Utah	0.00	497.01	105.64
Santa Monica, City of	0.00	0.00	0.00
Schooley Brothers	0.00	373.72	333.20
Seal Black Co.	353.00	813.84	133.05
Sepick & Rogers Co.	223.00	0.00	0.00
Shirley Bros. Co.	0.00	7.10	145.34
South Coast Asphalt Products	0.00	3,290.86	0.00
Slaughter, Ralph	0.00	0.00	240.71
Southern Nevada Paving	32.00	67.01	884.44
Standard Materials	3,124.00	0.00	0.00
Stratton Brothers	0.00	0.00	264.95
Sully-Miller Const.	2,997.00	0.00	26.90
Transit Tank, Int.	22,722.81	0.00	0.00
Union Oil Co.	3,338.00	81.08	0.00
U.S. Army—San Francisco	0.00	0.00	0.00
U.S. Navy Purchasing	0.00	0.00	0.00
Utah, State of	2,435.00	2,875.52	1,487.54
Vernon Asphalt Materials	49.00	100.97	0.00
Vickrey, J. W.	142.00	0.00	0.00
Vinnell Corp.	1.00	0.00	0.00
Wells Cargo	9,327.00	8,921.98	11,050.15
Wells, Stewart	1,758.00	179.53	0.00
Westland, Duke	119.00	76.06	54.55
Wilshire Oil Co.	117.00	0.00	0.00
Womack Const. Co.	0.00	255.39	65.41
Yeager, E. L.	0.00	148.21	0.00
Young, L. A. & Sons	0.00	1,766.01	0.00
Yucca Valley Products	0.00	0.00	0.00
	179,751.00	228,376.02	204,072.50

INDUSTRIAL ASPHALT
LIQUID ASPHALT SALES
(In Tons)

	1968	1969	1970
A-1 Paving & Grading	144.90	1.35	—0—
Agnew Construction	331.21	539.40	575.50
Arizona Refining Co.	19,250.70	11,291.52	20,633.97
Asphalt Seal Coat Co.	191.16	40.18	—0—
Brown, C. M.	—0—	553.63	—0—
Caliente, Nevada, City of	27.05	—0—	—0—
California, State of	320.36	1,967.84	420.81
Cash Sales	410.20	455.32	162.32
Clark County Road Dept.	—0—	598.71	—0—
Consumers Oil Co.	108.25	15.46	—0—
Cooley Bros. Co.	860.76	—0—	—0—
Dana Co.	167.19	194.65	101.82
Dennis, V. R.	467.10	5,295.76	—0—
Diamond Construction	—0—	335.16	—0—
Douglas Oil Co.	1,199.36	3,156.55	1,722.99
Edgington Oil Refineries	4,842.81	948.59	888.23
Edgington Oil—Oxnard	570.72	708.91	592.60
Gilmore & Page	185.46	184.37	153.89
Glazier, Leon	49.82	24.59	—0—
Helms, R. L.	4,449.51	2,693.62	—0—
Imperial County	2,745.32	—0—	—0—
I-A Hot Plants	145,204.60	148,638.21	187,085.56
Kasler-Ball-Yeager	14,695.70	115.41	—0—
Las Vegas Paving Co.	2,950.28	707.41	—0—
W. H. Ledbetter	—0—	—0—	—0—
Las Vegas, City of	83.67	33.07	—0—
Lincoln County, Nevada	71.46	837.20	—0—
Loel, Dick	341.89	453.34	285.83
Los Angeles, City of	112.49	61.69	3.07
Los Angeles, County of	533.65	369.21	202.04
Matich Corp.	8,032.80	11,265.21	16,151.41
Mesa Construction	284.33	25.18	—0—
Mineral County, Nevada	—0—	625.96	—0—
Miscellaneous (Customers Under 100 Tons)	1,728.45	1,502.92	1,468.13
Nato Corp.	—0—	112.56	22.55
Nevada Rock & Sand	1,569.31	6,285.12	—0—
Nevada Div. of Hwys.	3,875.89	7,672.90	—0—
Newhall Refining Co.	11,503.92	—0—	2,884.07
O'Brien's Asph. Maint. (OBAM)	525.08	703.75	1,084.19
Orange County, Calif.	799.69	976.67	290.09
Parker, Chas. T. Co.	72.78	24.60	—0—
Polich-Benedict	—0—	—0—	282.53

	1968	1969	1970
Raley, W. H.	2,397.30	745.08	48.98
Reynolds Elect. & Eng. Co.	1,266.12	2,754.13	492.71
Riverside County, Calif.	6,875.62	3,602.63	—0—
St. George, Utah, City of	—0—	103.73	—0—
Schooley Paving	262.65	372.44	330.67
Seal Black Co.	38.76	17.93	6.04
Slaughter, Ralph	337.12	—0—	—0—
Slurry Seal	—0—	252.85	—0—
Southern Nevada Paving	106.10	83.91	—0—
Stratton Bros.	58.66	—0—	—0—
Tiffany Construction	—0—	242.39	—0—
Tomei Construction	—0—	208.16	—0—
Union Oil Co.	9.87	109.99	—0—
U. S. Marine Corps.	584.18	853.73	162.44
U. S. Navy Purchasing	5,104.01	39.13	—0—
Utah, State of	1,023.54	245.93	—0—
Weeshoff Construction	—0—	136.39	—0—
Wells Cargo	10,564.95	13,675.07	—0—
Westland, Duke	76.92	77.08	13.59
Womack Const. Co.	—0—	269.78	—0—
Total	257,413.67	233,206.37	236,066.03

Exhibit "B"

PURCHASES FROM OTHER REFINERS OR PRODUCERS OF ASPHALT

(Tons and Dollars)

Producer	Tons	Dollars
1964		
Arizona Refining Co.	286.70	$ 8,051.00
Atlantic-Richfield Co.	80,667.90	1,265,813.13
Douglas Oil Co.	11,394.65	247,626.58
Edgington Oil Refining	57,963.05	948,001.89
Edgington-Oxnard Refinery	8,313.83	124,709.46
Golden Bear Oil Co.	3,873.35	56,282.75
Newhall Refining Co.	10,571.16	121,260.71
Seaside Oil Co.	2,073.76	34,433.12
Shell Oil Co.	9,390.30	245,509.60
Union Oil Co.	14,672.87	337,977.45
United Asphalt Co.	22,743.92	389,713.59
Gulf Oil Co.	13,289.00	185,689.00
1965		
Arizona Refining Co.	3,103.85	84,582.69
Atlantic-Richfield Co.	44,237.70	649,742.75
Douglas Oil Co.	877.12	14,247.95
Edgington Oil Refining	49,654.43	727,005.49
Edgington-Oxnard Refinery	17,469.35	264,997.43
Golden Bear Oil Co.	15,892.85	262,182.82
Newhall Refining Co.	6,475.98	98,475.42
Shell Oil Co.	17,090.57	379,722.81
Union Oil Co.	9,702.99	202,564.91
United Asphalt Co.	6,922.64	11,439.22
Gulf Oil Co.	160,201.80	2,030,376.00
1966		
Arizona Refining Co.	6,474.32	181,987.43
Atlantic-Richfield Co.	15,223.81	225,190.95
Douglas Oil Co.	1,675.01	36,253.47
Edgington Oil Co.	56,118.83	742,900.56
Edgington Oxnard Refinery	14,196.77	211,310.76
Golden Bear Oil Co.	22,106.65	426,256.57
Newhall Refining Co.	2,458.99	36,012.11
Seaside Oil Co.	469.81	6,342.45
Shell Oil Co.	19,342.21	403,282.69
Suhuaro Petroleum Co.	453.91	12,732.98
Union Oil Co.	330.98	6,893.51
Gulf Oil Co.	225,322.30	2,666,811.00
1967		
Arizona Refining Co.	5,755.34	156,699.08
Atlantic-Richfield Co.	9,284.56	126,740.99
Chevron Asphalt Co.	54.93	741.56

Producer	Tons	Dollars
Douglas Oil Co.	253.67	$ 1,473.99
Edgington Oil Co.	37,689.55	524,844.64
Edgington-Oxnard Refinery	12,844.61	190,760.85
Golden Bear Oil Co.	12,948.12	279,042.31
Newhall Refining Co.	794.55	11,208.21
Shell Oil Co.	19,582.24	470,538.26
Suhuaro Petroleum Co.	2,684.38	70,696.19
Gulf Oil Co.	205,723.90	2,374,381.00
1968		
Arizona Refining Co.	6,443.50	164,804.47
Atlantic-Richfield Co.	2,103.12	29,545.58
Douglas Oil Co.	2,311.79	29,360.45
Edgington Oil Co.	61,385.10	860,338.91
Edgington-Oxnard Refinery	18,217.42	257,028.85
Golden Bear Oil Co.	16,432.47	320,001.75
Newhall Refining Co.	9,889.57	137,014.99
Shell Oil Co.	20,618.95	475,643.00
Suhuaro Petroleum Co.	6,168.69	167,069.80
Gulf Oil Co.	251,452.90	2,908,278.00
1969		
Arizona Refining Co.	5,393.52	125,450.00
Atlantic-Richfield Co.	1,367.83	17,752.22
Chevron Asphalt Co.	320.14	4,321.93
Douglas Oil Co.	2,037.53	30,624.09
Edgington Oil Co.	47,127.30	688,362.08
Edgington-Oxnard Refinery	20,218.65	286,705.40
Golden Bear Oil Co.	18,912.10	362,580.80
Newhall Refining Co.	12,472.42	168,393.21
Powerine Oil Co.	3,007.68	265,413.16
Shell Oil Co.	34,174.48	788,390.79
Suhuaro Petroleum Co.	26,568.24	124,930.72
San Joaquin Refining	526.27	8,842.32
Union Oil Co.	344.58	7,089.24
Gulf Oil Co.	257,642.00	3,085,725.00
1970		
Arizona Refining Co.	7,986.81	236,676.02
Atlantic-Richfield Co.	13.62	185.87
Douglas Oil Co.	7,122.86	161,503.21
Edgington Oil Co.	28,586.92	447,949.36
Edgington-Oxnard Refinery	16,111.64	262,555.62
Golden Bear Oil Co.	12,342.97	229,264.60
Newhall Refining Co.	7,014.40	102,131.77
Powerine Oil Co.	75,207.77	772,209.97
Shell Oil Co.	25,974.21	453,557.70
Sahuaro Petroleum Co.	7,202.96	209,038.11
San Joaquin Refining	5,482.63	88,056.94
Gulf Oil Co.	187,247.69	2,641,364.00

Exhibit "C"

LIST OF PLANTS PRESENTLY OWNED BY INDUSTRIAL ASPHALT
SEPTEMBER 15, 1971

Company Designation	Batch Capacity (in Tons)	Plant (Asset) Acquired From	Company Acquired From	Shut Down	Installed By IA
Irwindale	2			X	X
Irwindale	2				X
Irwindale	2				X
Claremont	2				X
Highland	3				X
Antelope Valley	3				X
Oro Grande	2				X
Stanton	2				X
Orange A	2			X	X
El Segundo	2½	Geo. Oswald Co.		X	
Corona	2	Transitmix Corp.		X	
Los Angeles	3		Sparks-Mundo		
Sanger	2½	Pollard Bros.		X	
Santa Ana	3				X
Southwest	1½		Southwest Paving		
Southwest	2		Southwest Paving		
Fremont	2½	Clements Const.			
Fremont	3½	Clements Const.			
Pleasanton	2	Clements Const.			
Oakland	2	Independent Const.			
Saticoy	2	Consolidated Rock			
Castaic	2½				X
Sun Valley	5				X
Saticoy	5				X
Wilmington	6				X
Stanton	5				X
Rivergrade	6				X
San Diego	2	Ken Golden Co.			
Lemoncove	2½				X
Rosefield	3				X
Portable	2				X
Portable	3				X
Phoenix	3				X
Santa Fe Springs	2½				X
Claremont	3½				X
Orange B	2	J. J. Swigart Co.			
Grass Valley	2½	Gravada Enterprises			
Stockton	2				X
Las Vegas	3				X
Colton	1½	Calco Materials		X	
Colton	3				X
Sanger	3				X
Irwindale	10				X
Sun Valley	10				

AFFIDAVIT OF R. W. CURTIS

State of California
County of Los Angeles—ss.

R. W. Curtis, being first duly sworn, deposes and says:

I am Regional Attorney for defendant Industrial Asphalt, Inc. in the within action.

The foregoing answers to plaintiffs' interrogatories are true and correct to the best of my own knowledge.

Dated: February 18, 1972.

/s/ R. W. CURTIS
R. W. Curtis

[Jurat and Certificate of Service omitted in printing]

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Filed February 23, 1972]

RESPONSE TO DEFENDANT INDUSTRIAL ASPHALT, INC., TO PLAINTIFFS' REQUESTS FOR ADMISSIONS

Defendant Industrial Asphalt, Inc. (hereinafter referred to as "Industrial") responds to "Requests For Admissions Filed Pursuant To The Order Of Court Dated December 30, 1971, Relating To The Issue Of Interstate Commerce And Whether The Alleged Conspiracy Was One Affecting Interstate Commerce," dated January 1972, as follows:

* * * *

REQUEST FOR ADMISSION NO. 3:

That the Federal Government contributes a portion of the cost of construction of certain public highways.

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 4:

That the basis of such Federal participation is the Federal Aid Highway Act (23 U.S.C., Section 101 through 141).

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 5:

That under the Federal Aid Highway Act referred to hereinabove, the Federal Government assumes up to ninety percent

(90%) of the highway construction costs (23 U.S.C. 120) upon approval by the Secretary of Commerce of the plans and specifications submitted by the various state highway departments (23 U.S.C. Section 109).

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 6:

To qualify for contributions by the Federal Government the state must conform to standards set forth in the statute, such as vehicle weight and width limitations (23 U.S.C., Section 127), control of outdoor advertising (23 U.S.C., Section 131), creation of a highway safety program (23 U.S.C. Section 135), control of junk yards (23 U.S.C., Section 136).

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 7:

That each project is subject to the inspection and approval of the Secretary of Transportation and was formerly under the control of the Secretary of Commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 8:

That all wages paid for laborers and mechanics employed by contractors or subcontractors on roads funded by the Federal Aid

Highway Act is controlled by the Davis-Bacon Act (40 U.S.C., Section 276A) (23 U.S.C., Section 113).

RESPONSE TO REQUEST FOR ADMISSION NO. 8:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 9:

That small business enterprises are to be assisted by the Secretary insofar as feasible in obtaining contracts in order to encourage full and free competition under the Federal Aid Highway Act (23 U.S.C., Section 304).

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 10:

That any state declaring to avail itself of the provisions of the Federal Aid to Highway Act, (Title 23, U.S.C. 101 et seq.) shall have a highway department which shall have adequate powers and be suitably equipped and organized to discharge to the satisfaction of the Secretary the duties required by the Act (23 U.S.C. Section 302).

RESPONSE TO REQUEST FOR ADMISSION NO. 10:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 11:

That the State of California has qualified to receive and does receive funds from the Federal Government pursuant to Title 23 U.S.C. Section 101 et seq., and assents specifically to the provisions

of Title 23 of the United States Code relative to Federal aid and other cooperative highway work (Section 820, Streets and Highways Code of the State of California).

RESPONSE TO REQUEST FOR ADMISSION NO. 11:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 12:

That the State of California has apportioned ninety-eight and one-half percent (98½%) of the money received by it under the Federal Highway Act of 1950 for the improvement of county highways (Section 201, Streets and Highways Code of the State of California).

RESPONSE TO REQUEST FOR ADMISSION NO. 12:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 13:

That the plaintiff Copp, in order to perform work on county roads funded by the United States Government under the Federal Highway Aid Act (23 U.S.C. Section 101 et seq.) is required to comply with all the provisions of the executed order No. 11246, dated September 24, 1965.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 14:

That the defendant Sully-Miller, in order to perform work on the county roads funded by the United States Government under

the Federal Highway Aid Act (23 U.S.C., Section 101 et seq.), is required to comply with all the provisions of the executed order No. 11246, dated September 24, 1965.

RESPONSE TO REQUEST FOR ADMISSION NO. 14:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 15:

That the defendant Industrial, in order to perform work on county roads funded by the United States Government under the Federal Highway Aid Act (23 U.S.C., Section 101 et seq.), is required to comply with all the provisions of the Executive Order No. 11246, dated September 24, 1965.

RESPONSE TO REQUEST FOR ADMISSION NO. 15:

Without admitting the relevancy thereof, Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 16:

Attached hereto and made a part hereof are a group of documents labeled Exhibit "A", 1 through 11 respectively. Does SULLY-MILLER admit the documents so identified as "A" 1 through 11 are true and correct photostatic documents submitted by Sully-Miller on or about the date, February 2, 1970, reflecting the compliance by Sully-Miller to Executive Order 11246.

RESPONSE TO REQUEST FOR ADMISSION NO. 16:

This Request is not addressed to Industrial.

REQUEST FOR ADMISSION NO. 17:

That the defendant Gulf owns all the outstanding stock of the defendant Industrial.

RESPONSE TO REQUEST FOR ADMISSION NO. 17:

Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 18:

That Union Oil owns all the stock of the defendant Sully-Miller.

RESPONSE TO REQUEST FOR ADMISSION NO. 18:

Industrial admits that the matter stated in this request is true.

REQUEST FOR ADMISSION NO. 19:

That the defendant Union is engaged in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 19:

This request is not directed at Industrial.

REQUEST FOR ADMISSION NO. 20:

That the defendant Gulf is engaged in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 20:

Industrial admits that in some of its activities Gulf is engaged in interstate commerce, denies that in other of its activities Gulf is engaged in interstate commerce and specifically denies that Gulf was engaged in interstate commerce when it made sales of liquid asphalt to Industrial in Los Angeles County.

REQUEST FOR ADMISSION NO. 21:

That the defendant Edgington is engaged in interstate commerce.

RESPONSE TO REQUEST FOR ADMISSION NO. 21:

This request is not directed at Industrial.

REQUEST FOR ADMISSION NO. 22:

That the defendant Edgington ships some of the hot asphalt oil produced by it to other states of the United States, and sells hot asphalt oil to customers located in other states.

RESPONSE TO REQUEST FOR ADMISSION NO. 22:

This request is not directed at Industrial.

REQUEST FOR ADMISSSION NO. 23:

That the defendant Union ships some of the hot asphalt oil produced by it to other states of the United States, and sells hot asphalt oil to customers located in other states.

RESPONSE TO REQUEST FOR ADMISSION NO. 23:

This request is not directed at Industrial.

REQUEST FOR ADMISSION NO. 24:

That the defendant Gulf ships some of the hot asphalt oil produced by it to other states of the United States, and sells hot asphalt oil to customers located in other states.

RESPONSE TO REQUEST FOR ADMISSION NO. 24:

Industrial denies that defendant Gulf ships hot asphalt oil produced by Gulf in California to other states of the United States or that it sells hot asphalt oil to customers located in other states.

Dated: February 18, 1972.

R. W. Curtis
F. E. Laymon
D. R. Arnett

By /s/ R. W. CURTIS
R. W. Curtis

Attorneys for Industrial Asphalt, Inc.

[Certificate of Service omitted in printing]

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Filed March 13, 1972]

ANSWERS OF DEFENDANT EDGINGTON OIL COMPANY TO INTERROGATORIES PROPOUNDED BY PLAINTIFF COPP WITH REFERENCE TO THE ISSUE OF INTERSTATE COMMERCE:

Dated: January 19, 1972.

Defendant Edgington Oil Company (hereinafter called "Edgington"), a corporation, provides the following answers to Interrogatories Propounded to Edgington by plaintiff Copp, dated January 19, 1972, as follows:

* * * *

"INTERROGATORY NO. 10

With reference to the source of the crude oil which your company processes, state for each year from 1958 to date the source or (sic) said crude oil, and in said response set forth specifically:

A. The total amount of crude oil processed by your company within the State of California for each year in question. Set forth the number in terms of either gallons or barrels or the standard measurement which you may use at your refinery;

B. Set forth in the measurement used by you the amount of oil refined for each year which is obtained by your company, the origin of which was in the confines of the State of California.

C. Set forth in the measurement used by you the amount of oil refined for each year which is obtained by your company, the origin of which was outside of the confines of the State of California.

D. Set forth in the measurement used by you the amount of oil refined for each year which is obtained by your company, the

origin of which was outside the confines of the continental United States."

ANSWER TO INTERROGATORY NO. 10

In an attempt to expedite and facilitate the discovery in these proceedings, Edgington will accommodate plaintiffs by answering these interrogatories to the extent that the information is readily available.

Edgington Oil objects to this interrogatory on three grounds. Firstly, the source of crude oil processed by Edgington is wholly irrelevant to the issue of interstate commerce. Furthermore, inasmuch as plaintiffs have failed to allege a cause of action for fraudulent concealment in his complaint, the four year statute of limitations makes much of the material sought by plaintiffs irrelevant. Secondly, plaintiffs are soliciting information from 1958, a date which precedes the 1960 through 1969 time period imposed by this Honorable Court for purposes of discovery.

For the period commencing January 1, 1961 through and including December 31, 1969, Edgington purchased its crude oil from the Signal Oil and Gas Company. For the period commencing 1958 through and including 1960, Edgington purchased its crude oil from the Richfield Oil Company.

A. In regards to the total amount of crude oil processed by Edgington within the State of California, Edgington has no records which reflect this information for years prior to 1964. In regards to years 1964 through and including 1969, the answer:

Year	Barrels
1964	2,400,472
1965	2,777,020
1966	2,917,694
1967	3,277,498
1968	3,514,443
1969	3,255,474

B. The answer to this subparagraph is the same as the answer to subparagraph A. of this interrogatory.

C. None.

D. None.

"INTERROGATORY NO. 11

State the location of each refinery owned by your company within the State of California, identifying the period of time said refinery has been in existence from the years 1958 to date.

A. With reference to the refineries identified herein, set forth and state the capacity of each refinery in terms of the total crude oil processed by said refinery for each year, from 1958 to date.

B. State for each refinery the total amount of petroleum products produced by each refinery from 1958 to date, including gasoline, kerosene, motor oil, and liquid asphalt production. (The list requested is by way of example only, and if any other petroleum products are produced, you will set forth each and every other petroleum product so produced including quantity thereof.)"

ANSWER TO INTERROGATORY NO. 11

Edgington objects to this interrogatory on two grounds. Firstly, the interrogatory is irrelevant inasmuch as it: (1) bears no relevance to the issue of interstate commerce; (2) seeks information beyond the four year statute of limitations; and (3) seeks information for products other than liquid asphalt which is the subject of the causes of action against Edgington. Secondly, plaintiffs are soliciting information from 1958, a date which precedes the 1960 through 1969 time period imposed by this Honorable Court for purposes of the discovery. In an attempt to expedite and facilitate the discovery of these proceedings, and for the purpose of these proceedings only, Edgington will accommodate plaintiffs by answering these interrogatories to the extent that the information is readily available.

Edgington owns only one refinery, located at 2300 East Artesia Boulevard, Long Beach, California, and this refinery has been in existence since before 1958 to date.

A. The capacity of this refinery from 1958 to date is as follows:

Year	Rated Capacity (in barrels)
1958	7,000
1959	7,000
1960	7,000
1961	7,000
1962	9,000
1963	9,000
1964	16,000
1965	16,000
1966	16,000
1967	16,000
1968	16,000
1969	16,000

B. Edgington has no records which reflect the amount of actual asphalt produced by it for any years prior to 1964. For the fiscal years commencing 1964 through, and including, 1969, the answer to this subparagraph is as follows:

Year	Barrels
1964	1,078,865
1965	1,152,934
1966	1,318,930
1967	1,351,119
1968	1,391,744
1969	1,407,161

"INTERROGATORY NO. 12

For each of the petroleum products so identified in response to Interrogatory No. 11 hereinabove, state for each year in question the total volume of said product sold and distributed within the confiines of the State of California.

A. For each of the petroleum products so identified in response to Interrogatory No. 11 hereinabove, state for each year in question the total volume of said product sold and distributed outside the confiines of the State of California.

B. For each of the petroleum products so identified in response to Interrogatory No. 11 hereinabove, state for each year in question the total volume of said product sold and distributed outside the confiines of the continental United States."

ANSWER TO INTERROGATORY NO. 12

Edgington objects to this interrogatory on two grounds. Firstly, the interrogatory is irrelevant inasmuch as it seeks information beyond the four year statute of limitations. Secondly, plaintiffs are soliciting information from 1958, a date which precedes the 1960 through 1969 imposed by this Honorable Court for purposes of discovery. In an attempt to expedite and facilitate the discovery in these proceedings, and for the purpose of these proceedings only, Edgington will accommodate plaintiffs by answering these interrogatories to the extent that the information is readily available.

All of the asphalt produced by Edgington is sold and distributed within the confiines of the State of California, with the exception of the quantities set forth in Edgington's Answer to Interrogatory 15(C).

"INTERROGATORY NO. 13

With reference to all crude oil which you have hereinabove identified as its origin being outside the confines of the State of California, identify the means by which you received said oil including a description of the specific boat lines if said oil was received by boat, or the specific railroad lines if said oil was received by rail."

ANSWER TO INTERROGATORY NO. 13:

Edgington objects to this interrogatory as being irrelevant to the issue of interstate commerce. In an attempt to expedite and facilitate discovery in these proceedings, and for the purpose of these proceedings only, Edgington will accommodate plaintiffs by answering this interrogatory.

This interrogatory is not applicable inasmuch as all of the crude oil products processed by Edgington has its origins within the confines of the State of California.

"INTERROGATORY NO. 14

With reference to all petroleum products shipped outside the confines of the State of California by you, identify the means by which you shipped said oil including a description of the specific railroad lines if said oil was shipped by rail."

ANSWER TO INTERROGATORY NO. 14

To the extent that the interrogatory seeks information for products other than asphalt, Edgington submits that the interrogatory is objectionable as irrelevant to the plaintiffs' causes of action. In an effort to expedite and facilitate discovery in these proceedings, and for the purpose of these proceedings only, Edgington will accommodate plaintiffs by answering this interrogatory in regards to asphalt products.

All asphalt shipped outside the confines of the State of California by Edgington are shipped by rail and by truck and trailer. The specific railroads used are Union Pacific and Southern Pacific.

"INTERROGATORY NO. 15

With reference to liquid asphalt, set forth for each year from 1959 to the present, the total amount of liquid asphalt shipped to the states of:

A. Washington;
B. Oregon;
C. Nevada;
D. New Mexico."

ANSWER TO INTERROGATORY NO. 15

Edgington objects to this interrogatory on the ground that the information sought by the plaintiffs goes beyond the 1960 through 1969 time period for discovery imposed by this Court. In an attempt to expedite and facilitate discovery in these proceedings, and for the purpose of these proceedings only, Edgington will accommodate plaintiffs by answering this interrogatory to the extent the information is readily available.

A. None.
B. None.
C.

Year	*Amount (Tons)*
1964	69
1965	1,436
1966	134

D. None.

"INTERROGATORY NO. 16

With reference to sales made within the State of California, set forth for the years 1958 to the present, the total amount of liquid asphalt sold in each county of the State of California."

ANSWER TO INTERROGATORY NO. 16

Edgington objects to this interrogatory on the ground that the information sought by the plaintiffs goes beyond the 1960 through 1969 time period for discovery imposed by this Court. In an attempt to expedite and facilitate discovery in these proceedings, and for the purpose of these proceedings only, Edgington will accomodate plaintiffs by answering this interrogatory to the extent the information is readily available.

Edgington advises plaintiffs that the answer to this interrogatory can be obtained by plaintiffs from a review of Edgington's sales invoices, located at the offices of Edgington and available for inspection by plaintiffs.

"INTERROGATORY NO. 17

With reference to the sale of liquid asphalt, identify for each year from 1958 to date, each company to whom you have sold liquid asphalt, setting forth by way of summary for each year the total amount of liquid asphalt sold to said individual company. (Listing, for example, the total amount of liquid asphalt sold by Gulf to Sully-Miller for the year 1965)."

ANSWER TO INTERROGATORY NO. 17

Edgington objects to this interrogatory on the ground that the information sought by the plaintiffs goes beyond the 1960 through 1969 time period for discovery imposed by this Court. In an attempt to expedite and facilitate discovery in these proceedings, and for the purpose of these proceedings only, Edgington will accommodate plaintiffs by answering this interrogatory to the extent the information is readily available.

Edgington advises plaintiffs that it keeps no annual records summarizing sales to customers. Inasmuch as Edgington does have monthly reports which reflect this information, the answer to this interrogatory can be obtained from a review of Edgington's Asphalt Tonnage Reports, located at the offices of Edgington and available for inspection by plaintiffs.

DATED: This 10th day of February, 1972

GROSSMAN, SMALTZ, GRAVEN & PERRY

By /s/ DONALD C. SMALTZ
Donald C. Smaltz

Attorneys for Defendant
Edgington Oil Company

VERIFICATION—446 and 2015.5 C.C.P.

State of California
County of Los Angeles —ss.

The undersigned (being first duly sworn) says:

I am the President of Edgington Oil Company, a corporation organized and existing under the laws of California, which is a defendant in the above-entitled action, and I have been authorized to make this verification on its behalf. I have read the foregoing Answers of Defendant Edgington Oil Company to Interrogatories, etc., and I know the contents thereof; and that the same is true of my own knowledge, except as to matters which are therein stated upon my information or belief, and as to those matters I believe to be true.

/s/ RALPH EDGINGTON

[Jurat and Certificate of Service
omitted in printing]

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Filed April 7, 1972]

MOTION OF DEFENDANTS GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., AND EDGINGTON OIL COMPANY FOR PRETRIAL ORDER LIMITING THE ISSUES

and

MOTION OF DEFENDANT SULLY-MILLER CONTRACTING COMPANY FOR SUMMARY JUDGMENT

TO PLAINTIFFS AND TO THEIR ATTORNEYS, MESSRS. CORINBLIT AND SHAPERO:

Please Take Notice, hereby given, that on Tuesday, May 23, 1972, at 10:00 a.m., or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Russell E. Smith, United States District Court, Missoula, Montana, or at such other time and place as the Court may hereafter designate, defendants Gulf Oil Corporation, Union Oil Company of California, Industrial Asphalt, Inc., and Edgington Oil Company will move the Court to enter a pretrial order, in the form attached hereto, limiting the issues for purposes of all further proceedings herein to the questions (a) whether said defendants, or any of them, contracted, combined, or conspired to restrain or monopolize interstate trade and commerce in the business of selling liquid asphalt, in violation of Section 1 or 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and (b) if so, whether plaintiffs, or any of them, were injured in their businesses or properties by reason of any such violation; and

Please Take Further Notice, hereby given, that at the same time and place, defendant Sully-Miller Contracting Company

will move the Court to enter an order of summary judgment, in the form attached hereto, in favor of said defendant on all claims herein asserted against it by plaintiffs.

These motions will be made pursuant to R.C.P. Rules 16 and 56, will be based on all the files of this and the other coordinated cases, and will be made on the ground that the record now shows that, with the possible exception of those Sherman Act claims just mentioned, this Court lacks jurisdiction over the subject matter of this action, all as more particularly appears in the memorandum in support of motions, served and filed herewith.

DATED: April 7, 1972.

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Attorneys for Defendants Gulf Oil Corporation and Industrial Asphalt, Inc.

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Richard Haas
George A. Cumming, Jr.
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111 Sutter Street
San Francisco 94104
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Attorneys for Defendants Union Oil Company of California and Sully-Miller Contracting Company

By /s/ GEORGE A. CUMMING, JR.
George A. Cumming, Jr.
On behalf of all defendants

[Proposed forms of order and judgment follow]

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Lodged April 7, 1972]

[PROPOSED] PRETRIAL ORDER LIMITING THE ISSUES

Defendants Gulf Oil Corporation, Union Oil Company of California, Industrial Asphalt, Inc., and Edgington Oil Company having moved the Court for a pretrial order pursuant to R.C.P. Rule 16 (1), limiting the issues herein on the grounds that the Court lacks jurisdiction over the subject matter of various of the claims herein asserted by plaintiffs, and the motion having duly and regularly come on for hearing, all parties being represented at the hearing by their respective counsel, and the Court having considered the memoranda and arguments of counsel, and good cause appearing

It is Hereby Ordered as follows:

1. All discovery and further proceedings herein shall be limited to the following issues:

(a) Whether said defendants, or any of them, violated Sections 1 or 2 of the Sherman Act, and, if so,

(b) Whether and to what extent, if any, plaintiffs or any of them were injured in their businesses or properties by reason of said violations, if any.

2. No discovery or further proceedings shall be had herein with respect to any of the remaining claims herein asserted, *viz.:*

(a) Any claims that defendants, or any of them, violated the Robinson-Patman Act, 15 U.S.C. § 13(a), in connection with the marketing of liquid asphalt or in connection with the marketing of asphaltic concrete;

(b) Any claims that defendants, or any of them, violated Section 3 of the Clayton Act, 15 U.S.C. § 14, in connection with the marketing of asphaltic concrete;

(c) The claim that defendant Gulf Oil Corporation violated Section 7 of the Clayton Act, 15 U.S.C. § 18, by acquiring all the capital stock of defendant Industrial Asphalt, Inc.;

(d) The claim that defendant Union Oil Company of California violated Section 7 of the Clayton Act by acquiring all the capital stock of defendant Sully-Miller Contracting Company;

(e) Any claims that defendants, or any of them, violated Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, in connection with the marketing of asphaltic concrete; or

(f) Any claims that defendants, or any of them, violated Section 16,720 of the California Business and Professions Code.

3. This order shall govern all further proceedings in this case until and unless modified or set aside by subsequent order of the Court, granted on motion of any party and for good cause shown.

Dated: ....., 1972.

.....

United States District Judge

United States District Court for the Northern District of California

[Title of case omitted in printing]

[Lodged April 7, 1972]

[PROPOSED] JUDGMENT OF DISMISSAL

Defendant Sully-Miller Contracting Company having moved the Court, pursuant to R.C.P. Rule 56, for summary judgment in its favor on the ground that the Court lacks jurisdictioin over the subject matter of all claims herein asserted by plaintiffs and each of them against said defendant, and the motion having duly and regularly come on for hearing, the parties being represented by their respective counsel, and the Court having considered the memoranda and arguments of counsel, and having found that there is no genuine issue of material fact and that said defendant is entitled to judgment as a matter of law,

It Is Hereby Ordered that the motion of defendant Sully-Miller Contracting Company for summary judgment shall be and it is hereby granted, and that plaintiffs shall take nothing against said defendant, defendant to have and recover its costs taxed in the sum of $.....

Dated: ....., 1972.

.....

United States District Judge

[Certificate of Service omitted in printing]

United States District Court for the Northern District of California

[Title of case omitted in printing]
[Filed May ' 1972]

AFFIDAVIT OF ERNEST A. COPP IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

County of Los Angeles
State of California—ss.

Now comes the affiant, Ernest A. Copp, who being first duly sworn, deposes and states as follows:

1. He is now and was at all times herein one of the plaintiffs in the above entitled cause.

2. He is now and was at all times herein one of the owners of Copp Paving Company, Inc. and Copp Equipment Company, Inc.

3. Affiant has been active in the asphalt paving business continuously since 1954. In the course of operating his asphalt paving business, his two companies, combined, purchase the approximate sum of $90,000.00 per year of liquid asphalt materials.

4. Affiant is familiar with the competitive conditions of the paving business, and based upon his knowledge of the industry, alleges that there are two companies, to wit, Sully-Miller Contracting Company and Industrial Asphalt, Inc., that control 75% of the total paving business in Southern California.

5. Affiant is informed and believes, and based upon said information and belief alleges that Industrial Asphalt, Inc. is a totally owned subsidiary of Gulf Oil Corporation, and that Sully-Miller Contracting Company is a totally owned subsidiary of Union Oil Company of California.

6. Defendant Industrial Asphalt, Inc. (hereinafter "Industrial"), pursuant to interrogatories propounded to said defendant, has answered said interrogatories under the date of February 18, 1972. In its response to said interrogatories, Industrial lists its

total liquid asphalt purchases for the years 1964, 1965, 1966, 1967, 1968, 1969, and 1970, providing the total tonnage purchased from each refining company and the dollar amount paid for the total tonnage purchased. (See Exhibit B to Industrial's response to plaintiffs' interrogatories.)

7. Affiant has performed the following mathematical calculations based upon said Exhibit B. First, he has divided the total dollar price paid to each refiner by the number of tons purchased from each refiner, thereby obtaining the price per ton paid. He has then entered on a copy of defendant's Exhibit B the average price per ton paid to each purchaser for each year in question. (See Exhibit "A" hereto, attached hereto, and made a part hereof by reference.) The average price paid to producers other than Gulf Oil Corporation was obtained by adding the tonnage purchased from all producers other than Gulf Oil Corporation to obtain a single figure, adding the total dollars paid to such other producers to obtain a single figure; and the total dollars paid to all producers other than Gulf Oil Corporation was then divided by the total tonnage purchased from all producers other than Gulf Oil Corporation.

The above computations reflect the following facts:

Year	Average Price Gulf Oil Corp.	Average Price Other Producers	Price Difference
1964	$13.97	$17.02	$3.05
1965	12.79	15.66	2.87
1966	11.83	16.48	4.65
1967	11.54	17.69	6.15
1968	11.56	17.00	5.44
1969	11.98	14.95	2.95
1970	14.10	15.34	1.24

Based upon the above analysis, it would appear that defendant Industrial is purchasing liquid asphalt from Gulf Oil Corporation at a figure consistently lower than the prices paid all other producers, and defendant Industrial therefore has a built-in competitive advantage over the plaintiffs Copp, or any other independent contractor as the result of said advantage.

8. Affiant was present when the depositions of the representatives of Sully-Miller Contracting Company (hereinafter "Sully-Miller") were taken and said representatives refused on advice of their attorneys to respond to any questions concerning prices. Sully-Miller has likewise refused to supply pricing information of the type supplied by Industrial for analysis by affiant. Because of said refusal of Sully-Miller and its representatives, affiant is unable to provide information to the Court with reference to the competitive advantage which Sully-Miller enjoys in the same manner as Industrial.

Affiant can state, of his own knowledge due to his long experience in the paving business, that he has bid on jobs many times and has failed to receive the right to construct and perform on such jobs, having been underbid by either Industrial or Sully-Miller, and that both Sully-Miller and Industrial have either lost money on those jobs, or have had the benefit of liquid asphalt prices substantially lower than those available to affiant and his companies, said prices being reflected in Industrial's own figures furnished in its Exhibit B (Exhibit "A" hereto).

Affiant can make this statement because: (1) his gravel costs are the same as the costs of his competitors; (2) his labor costs are the same as the labor costs of his competitors (in fact, employees in the pavement industry shift from one company to another, depending upon the needs of the company at the time); (3) his companies' plant uses the same equipment as that used by his competitors (defendants Industrial and Sully-Miller); and (4) the only variable is his cost of liquid asphalt.

/s/ ERNEST A. COPP
Ernest A. Copp

[Jurat omitted in printing]

[Exhibit A to affidavit follows]

Exhibit "A"

PURCHASES FROM OTHER REFINERS OR PRODUCERS OF ASPHALT
(Tons and Dollars)

Producer	Tons	Dollars	
1964			
Arizona Refining Co.	286.70	$ 8,051.00	$28.15
Atlantic-Richfield Co.	80,667.90	1,265,813.13	15.69
Douglas Oil Co.	11,394.65	247,626.58	21.73
Edgington Oil Refining	57,963.05	948,001.89	16.35
Edgington-Oxnard Refinery	8,313.83	124,709.46	15.00
Golden Bear Oil Co.	3,873.35	56,282.75	14.53
Newhall Refining Co.	10,571.16	121,260.71	11.71
Seaside Oil Co.	2,073.76	34,433.13	16.61
Shell Oil Co.	9,390.30	245,509.60	26.14
Union Oil Co.	14,672.87	337,977.45	23.04
United Asphalt Co.	22,743.92	389,713.59	17.31
Gulf Oil Co.	13,289.00	185,689.00	13.97
1965			
Arizona Refining Co.	3,103.85	84,582.69	$27.25
Atlantic-Richfield Co.	44,237.70	649,742.75	14.68
Douglas Oil Co.	877.12	14,247.95	16.24
Edgington Oil Refining	49,654.43	727,005.49	14.64
Edgington-Oxnard Refinery	17,469.35	264,997.43	15.16
Golden Bear Oil Co.	15,892.85	262,182.82	16.49
Newhall Refining Co.	6,475.98	98,475.42	15.20
Shell Oil Co.	17,090.57	379,722.81	22.21
Union Oil Co.	9,702.99	202,564.91	20.87
United Asphalt Co.	6,922.64	11,459.22	1.64
Gulf Oil Co.	160,201.80	2,050,376.00	11.79
1966			
Arizona Refining Co.	6,474.32	181,987.43	$28.11
Atlantic-Richfield Co.	15,223.81	225,190.95	14.79
Douglas Oil Co.	1,675.01	36,253.47	21.64
Edgington Oil Co.	56,118.83	742,900.56	13.23
Edgington-Oxnard Refinery	14,196.77	211,310.76	14.88
Golden Bear Oil Co.	22,106.65	426,256.57	19.28
Newhall Refining Co.	2,458.99	36,012.11	14.68
Seaside Oil Co.	469.81	6,342.45	13.50
Shell Oil Co.	19,342.21	403,282.69	20.85
Suhuaro Petroleum Co.	453.91	12,732.98	26.31
Union Oil Co.	330.98	6,893.51	20.83
Gulf Oil Co.	225,322.30	2,666,811.00	11.83

Producer	Tons	Dollars	
1967			
Arizona Refining Co.	5,755.34	$ 156,699.08	$27.22
Atlantic-Richfield Co.	9,284.56	126,740.99	13.65
Chevron Asphalt Co.	54.93	741.56	13.72
Douglas Oil Co.	253.67	1,473.99	5.82
Edgington Oil Co.	37,689.35	524,841.64	13.92
Edgington-Oxnard Refinery	12,844.61	190,760.85	14.85
Golden Bear Oil Co.	12,948.12	279,042.31	21.55
Newhall Refining Co.	794.55	11,208.21	14.11
Shell Oil Co.	19,582.24	470,538.26	24.02
Suhuaro Petroleum Co.	2,684.38	70,696.19	26.33
Gulf Oil Co.	205,723.90	2,374,381.00	11.54
1968			
Arizona Refining Co.	6,443.50	164,804.47	$25.57
Atlantic-Richfield Co.	2,103.12	29,545.58	14.04
Douglas Oil Co.	2,311.79	29,360.45	12.70
Edgington Oil Co.	61,385.10	860,338.91	14.01
Edgington-Oxnard Refinery	18,217.42	257,028.85	14.10
Golden Bear Oil Co.	16,432.47	320,001.75	19.47
Newhall Refining Co.	9,889.57	137,014.99	13.85
Shell Oil Co.	20,618.95	475,643.00	23.06
Suhuaro Petroleum Co.	6,168.69	167,069.80	27.08
Gulf Oil Co.	251,452.90	2,908,278.00	11.56
1969			
Arizona Refining Co.	5,393.52	125,450.00	$23.26
Atlantic-Richfield Co.	1,367.83	17,752.22	12.98
Chevron Asphalt Co.	320.14	4,321.93	13.50
Douglas Oil Co.	2,037.53	30,624.09	15.03
Edgington Oil Co.	47,127.30	688,362.08	14.60
Edgington-Oxnard Refinery	20,218.65	286,705.40	14.18
Golden Bear Oil Co.	18,912.10	362,580.80	19.17
Newhall Refining Co.	12,472.42	168,393.21	13.50
Powerine Oil Co.	3,007.68	265,413.16	88.26
Shell Oil Co.	34,174.48	788,390.79	23.06
Suhuaro Petroleum Co.	26,568.24	124,950.72	4.03
San Joaquin Refining	526.27	8,842.32	16.80
Union Oil Co.	344.58	7,089.24	20.60
Gulf Oil Co.	257,642.00	3,085,725.00	11.98
1970			
Arizona Refining Co.	7,986.81	236,676.02	$29.63
Atlantic-Richfield Co.	13.62	185.87	14.23
Douglas Oil Co.	7,122.86	161,303.21	22.67
Edgington Oil Co.	28,586.92	447,949.36	15.67
Edgington-Oxnard Refinery	16,111.64	262,555.62	16.29
Golden Bear Oil Co.	12,342.97	229,264.60	18.57
Newhall Refining Co.	7,014.40	102,131.77	14.56
Powerine Oil Co.	75,207.77	772,209.97	10.02
Shell Oil Co.	25,974.21	453,357.70	17.46
Sahuaro Petroleum Co.	7,202.96	209,038.11	29.02
San Joaquin Refining	5,482.63	88,036.94	16.06
Gulf Oil Co.	187,247.69	2,641,364.00	14.10

[Certificate of Service omitted in printing]

The order of the United States District Court for the Northern District of California, filed May 31, 1972, in *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, Copp Paving Company, Inc., et al.*, Plaintiffs, v. *Gulf Oil Company, et al.*, Defendants, No. C-71-608 therein, is printed as Appendix A to the Petition for Writ of Certiorari in this cause, and is incorporated herein by reference.

No. 72-2152

In the United States Court of Appeals for the Ninth Circuit

(Filed September 26, 1972)

In Re Coordinated Pre-Trial Proceedings
In
Western Liquid Asphalt Cases

Copp Paving Company, Inc.: Copp Equipment Company, Inc.; and Ernest A. Copp,
Appellants,

vs.

Gulf Oil Company: Union Oil Company of California: Industrial Asphalt, Inc.; Sully-Miller Contracting Company; and Edgington Oil Company,
Respondents.

APPELLANTS' OPENING BRIEF

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[Text of Opening Brief not designated]

[Appendix A and Appendix B to Opening Brief follow]

[App. A to Appellants' Opening Brief]

MINERAL INDUSTRY SURVEYS

U.S. Dept. of the Interior,

Bureau of Mines

[Masthead]

SHIPMENTS OF ASPHALT IN 1967

Petroleum Asphalt:

Domestic shipments of asphalt and asphaltic products in 1967 amounted to 25,802,667 short tons, 2.4 percent less than the 26,437,603 short tons shipped in 1966. A marginal decline from the 1966 level was reflected in road oil shipments of 1,033,437 short tons in 1967, according to the Bureau of Mines, United States Department of the Interior.

In 1967, asphalt for paving declined 4.0 percent from the previous year, due mainly to the decrease in road construction. In 1967, asphalt for paving accounted for 73.1 percent of total domestic shipments followed by roofing and miscellaneous use with 15.4 and 11.5 percent, respectively.

Shipments of asphaltic cements and fluxes amounted to 19,503,551 short tons or 75.6 percent of the asphalt shipments in 1967. Emulsified and cutback asphalts accounted for the remaining 24.4 percent.

Native Asphalt:

Gilsonite, bituminous limestone and sandstone shipments in 1967 totaled 1,866,666 short tons valued at $8,136,000.

Petroleum asphalt imported in 1967, including natural, totaled 1,172,000 short tons, 5.6 percent more than the 1,110,000 short tons imported in 1966. Exports in 1967 were 77,000 short tons, 11.5 percent less than the calendar year of 1966.

Prepared by James M. Foley, Mineral Specialist, June 11, 1968, Code 703-557-4651

Table 1.—Shipments of petroleum asphalt for consumption in the United States, by type and principal use[1]

(Short tons)

	1963	1964	1965	1966	1967
United States, total	22,647,821	24,045,850	25,027,723	26,437,603	25,802,667
By type:					
Asphalt cements and fluxes	16,102,940	17,856,682	18,519,011	19,603,749	19,503,551
Emulsified asphalts	1,920,198	1,832,389	2,080,876	2,266,825	2,176,194
Cutback asphalts	4,624,683	4,356,789	4,427,836	4,567,029	4,122,922
By principal use:					
Paving products	16,947,389	17,366,521	18,441,367	19,648,172	18,866,855
Roofing products	3,821,281	4,216,846	4,030,873	3,991,764	3,966,862
All other products	1,879,151	2,462,493	2,555,483	2,797,667	2,968,950

1. Excludes domestic bituminous limestone and sandstone, gilsonite and road oil.

Table 2.--Shipments of petroleum-asphalt paving products for consumption in the United States, by PAD districts and States

(Short tons)

District and State	Asphalt cements		Cutback asphalts		Emulsified asphalts		Total	
	1966	1967	1966	1967	1966	1967	1966	1967
District 1:								
Connecticut	152,167	138,769	38,968	28,056	3,414	4,291	194,549	171,116
Delaware	29,768	19,434	2,048	2,418	782	691	32,598	22,543
Florida	433,440	475,252	91,825	82,387	50,066	47,923	595,331	605,562
Georgia	347,326	377,170	101,485	104,680	42,252	41,147	491,063	522,997
Maine	82,992	75,862	66,769	62,077	10,533	8,101	160,294	146,040
Maryland and District of Columbia	310,190	308,269	75,672	74,888	76,921	78,087	462,783	461,204
Massachusetts	314,420	327,845	52,934	55,662	236	323	367,580	383,830
New Hampshire	47,931	50,693	49,397	22,151	26	81	97,354	72,925
New Jersey	384,326	401,322	93,034	73,337	25,897	24,356	503,255	499,015
New York	689,750	617,432	369,767	344,344	261,611	140,179	1,301,128	1,002,155
North Carolina	336,467	372,027	77,084	72,672	113,969	121,558	527,502	566,257
Pennsylvania	525,644	600,311	190,031	200,354	83,136	87,980	798,811	888,645
Rhode Island	122,159	103,773	29,123	12,564	394	824	151,676	117,161
South Carolina	213,129	220,269	22,125	21,706	61,975	56,874	297,229	298,849
Vermont	41,186	31,737	20,484	25,449	983	423	62,653	57,609
Virginia	350,848	282,926	103,800	96,390	48,166	45,412	502,812	424,728
West Virginia	59,249	66,381	29,764	27,808	16,843	3,331	101,856	97,520
Total	4,637,790	4,467,454	1,294,502	1,207,143	797,180	663,561	6,349,472	6,338,158
District 2:								
Illinois	434,668	334,998	223,768	220,748	30,832	33,542	689,268	589,288
Indiana	274,596	297,213	153,363	163,444	209,993	207,273	637,932	667,930
Iowa	344,695	337,619	98,337	88,552	45,803	37,611	490,833	463,782
Kansas	275,074	223,900	237,434	183,357	18,036	22,561	530,544	429,818
Kentucky	235,421	259,136	70,289	78,087	83,829	105,067	389,539	442,290
Michigan	333,440	347,362	47,157	47,951	74,390	77,891	434,987	473,204
Minnesota	377,764	269,552	189,730	132,550	38,991	36,889	606,487	438,991
Missouri	217,088	224,040	361,408	297,120	7,170	5,828	585,666	526,988
Nebraska	69,554	58,415	65,677	43,858	25	584	127,036	102,857
North Dakota	96,953	103,708	45,672	55,840	15,127	85,417	157,552	244,965
Ohio	470,258	503,675	367,200	347,139	137,343	145,402	974,701	996,216
Oklahoma	341,800	314,130	195,492	171,034	1,562	4,308	538,054	489,472
South Dakota	62,634	56,488	51,305	56,373	2,867	4,964	116,808	117,825
Tennessee	548,225	394,118	65,640	38,083	155,474	136,349	749,339	568,750
Wisconsin	238,099	274,699	123,793	101,234	12,610	11,206	374,502	387,137
Total	4,215,451	3,999,253	2,273,865	2,025,390	833,932	914,690	7,323,248	6,939,333
District 3:								
Alabama	215,185	228,005	45,093	38,313	89,864	100,484	350,142	366,800
Arkansas	83,454	112,618	65,737	66,201	41,361	43,084	190,572	221,703
Louisiana	178,737	175,228	38,537	21,927	41,679	54,243	258,933	251,398
Mississippi	173,119	240,226	4,436	6,856	45,822	15,370	225,377	262,448
New Mexico	149,044	136,633	73,932	64,823	4,491	9,974	227,467	211,432
Texas	799,133	826,944	178,925	201,270	42,925	43,578	1,019,982	1,069,792
Total	1,398,671	1,717,650	410,660	399,390	266,142	266,733	2,253,493	2,383,573
District 4:								
Colorado	196,893	220,421	56,822	41,784	3,807	5,960	257,522	268,165
Idaho	73,631	93,752	44,220	40,561	4,344	6,909	122,197	101,222
Montana	168,106	134,368	61,590	48,432	6,426	13,432	174,120	186,452
Utah	169,529	139,742	30,062	33,870	20	348	199,596	173,780
Wyoming	71,262	68,909	38,717	29,387	-	249	109,979	98,545
Total	617,419	607,612	231,396	194,034	14,599	26,898	863,414	828,364
District 5:								
Alaska	11,653	16,254	30,735	4,536	4,831	2,731	47,219	23,521
Arizona	152,755	149,200	25,343	45,503	65,877	48,967	243,977	259,670
California	1,260,019	1,132,309	148,145	113,897	131,840	116,813	1,520,004	1,363,019
Hawaii	40,145	32,259	2,564	2,767	663	421	43,374	35,447
Nevada	92,906	98,094	18,667	20,076	5,372	3,970	116,925	122,142
Oregon	253,196	181,713	38,787	39,284	39,393	30,018	331,296	241,014
Washington	255,853	236,940	86,461	80,882	15,436	16,792	355,750	332,614
Total	2,066,527	1,862,770	348,604	296,945	263,412	217,712	2,658,545	2,377,427
Total United States	12,905,858	12,654,739	4,567,029	4,122,922	2,175,285	2,089,594	19,648,172	18,866,855

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Table 3.--Shipments of petroleum-asphalt roofing products for consumption in the United States, by PAD districts and States

(Short tons)

District and State	Asphalt cements and fluxes		Emulsified asphalts		Total	
	1966	1967	1966	1967	1966	1967
District 1:						
Connecticut	2,539	2,778	2	-	2,541	2,778
Delaware	81,210	91,861	-	-	81,210	91,861
Florida	109,826	130,536	-	3	109,826	130,539
Georgia	157,311	148,507	1	11	157,312	148,518
Maine	-	145	-	-	-	145
Maryland and District of Columbia	75,427	80,581	26	97	75,453	80,678
Massachusetts	73,845	89,648	-	2	73,845	89,650
New Hampshire	80	-	-	-	80	-
New Jersey	289,770	240,597	31	2	289,801	240,599
New York	21,072	19,665	32	-	21,104	19,665
North Carolina	44,433	46,477	3	-	44,436	46,477
Pennsylvania	248,915	261,821	148	238	249,063	262,059
Rhode Island	5,870	10,241	-	-	5,870	10,241
South Carolina	64,677	64,583	11	35	64,688	64,618
Vermont	-	1	-	-	-	1
Virginia	9,347	10,522	2	-	9,349	10,522
West Virginia	37,971	1,031	-	-	37,971	1,031
Total	1,222,293	1,198,994	256	388	1,222,549	1,199,382
District 2:						
Illinois	629,140	486,871	-	-	629,140	486,871
Indiana	67,796	136,419	-	-	67,796	136,419
Iowa	4,664	2,704	-	-	4,664	2,704
Kansas	22,276	21,839	-	-	22,276	21,839
Kentucky	6,510	9,588	1	-	6,511	9,588
Michigan	93,540	85,988	4	-	93,544	85,988
Minnesota	130,726	133,698	-	-	130,726	133,698
Missouri	205,533	218,643	229	-	205,762	218,643
Nebraska	6,201	5,410	-	-	6,201	5,410
North Dakota	2,846	3,159	-	-	2,846	3,159
Ohio	227,028	199,148	150	22	227,178	199,170
Oklahoma	49,565	85,248	-	-	49,565	85,248
South Dakota	3,071	2,613	-	-	3,071	2,613
Tennessee	49,450	45,395	-	-	49,450	45,395
Wisconsin	9,014	11,165	-	-	9,014	11,165
Total	1,507,360	1,447,888	384	22	1,507,744	1,447,910
District 3:						
Alabama	153,608	158,582	181	189	153,789	158,771
Arkansas	114,471	113,604	-	-	114,471	113,604
Louisiana	110,104	119,407	-	18	110,104	119,425
Mississippi	14,546	11,528	-	-	14,546	11,528
New Mexico	2,927	7,540	-	-	2,927	7,540
Texas	323,455	337,348	15	17	323,470	337,365
Total	719,111	748,009	196	224	719,307	748,233
District 4:						
Colorado	43,176	42,504	-	5	43,176	42,509
Idaho	2,855	3,614	-	-	2,855	3,414
Montana	2,800	3,200	-	-	2,800	3,200
Utah	17,351	15,872	-	152	17,351	16,024
Wyoming	991	1,028	-	-	991	1,028
Total	67,173	66,018	-	157	67,173	66,175
District 5:						
Alaska	732	645	-	-	732	645
Arizona	244	111	6	-	250	111
California	388,880	418,652	272	233	389,152	418,885
Hawaii	7,247	5,625	31	2	7,278	5,627
Nevada	1,649	1,182	-	1	1,649	1,183
Oregon	39,199	38,602	26	3	39,225	38,605
Washington	36,616	40,007	89	99	36,705	40,106
Total	474,567	504,824	424	338	474,991	505,162
Total United States	3,990,504	3,965,733	1,260	1,129	3,991,764	3,966,862

Table 4.--Shipments of all other petroleum-asphalt products for consumption in the United States, by P&D districts and States

(Short tons)

District and State	Asphalt cements and fluxes		Emulsified asphalts		Total	
	1966	1967	1966	1967	1966	1967
District 1:						
Connecticut	36,971	33,574	777	574	37,748	34,148
Delaware	3,529	1,090	49	24	3,578	1,114
Florida	86,125	80,667	904	853	87,029	81,520
Georgia	120,954	124,463	591	910	121,545	125,373
Maine	2,537	2,153	182	228	2,719	2,381
Maryland and District of Columbia	41,221	45,573	4,327	1,486	45,548	47,059
Massachusetts	82,669	77,315	2,151	2,306	84,820	79,621
New Hampshire	110	15	183	159	293	174
New Jersey	251,965	269,707	1,325	931	253,290	270,638
New York	32,075	40,144	2,958	3,166	35,033	43,310
North Carolina	68,999	67,664	1,811	1,982	70,810	69,646
Pennsylvania	103,597	94,657	5,983	6,399	109,580	101,056
Rhode Island	5,917	9,032	328	298	6,245	9,330
South Carolina	3,536	2,099	13,930	14,000	17,466	16,099
Vermont	909	392	56	29	965	421
Virginia	9,538	13,434	1,756	1,723	11,294	15,157
West Virginia	5,786	540	113	145	5,899	685
Total	856,438	862,519	37,424	35,213	893,862	897,732
District 2:						
Illinois	640,088	809,817	7,997	8,954	648,085	818,771
Indiana	127,541	89,592	619	712	128,160	90,304
Iowa	4,048	5,876	2,704	2,185	6,752	8,061
Kansas	11,015	10,310	39	15	11,054	10,325
Kentucky	18,435	14,600	192	497	18,627	15,097
Michigan	54,515	44,212	3,254	3,857	57,769	48,069
Minnesota	42,352	89,821	836	714	43,188	90,535
Missouri	73,882	62,358	2,070	2,265	75,952	64,623
Nebraska	3,542	5,477	122	111	3,664	5,588
North Dakota	622	636	98	7	720	643
Ohio	187,761	165,466	8,686	8,163	196,447	173,629
Oklahoma	33,963	37,722	68	13	34,031	37,735
South Dakota	1,270	2,387	1	-	1,271	2,387
Tennessee	4,525	41,282	328	215	4,853	41,497
Wisconsin	34,906	42,268	2,191	2,283	37,097	44,551
Total	1,238,465	1,421,824	29,205	29,991	1,267,670	1,451,815
District 3:						
Alabama	12,986	13,902	1,066	881	14,052	14,783
Arkansas	26,643	14,807	118	221	26,761	15,028
Louisiana	93,557	90,254	485	843	94,042	91,097
Mississippi	12,385	13,750	368	304	12,753	14,054
New Mexico	892	866	31	105	923	971
Texas	285,101	281,827	5,690	5,995	270,791	287,822
Total	411,566	415,406	7,758	8,349	419,324	423,755
District 4:						
Colorado	2,775	2,890	16	21	2,791	2,911
Idaho	354	199	10	26	364	225
Montana	54	97	9	1	63	98
Utah	4,840	4,792	6	10	4,846	4,802
Wyoming	930	317	1	-	931	317
Total	8,953	8,295	42	58	8,995	8,353
District 5:						
Alaska	849	508	41	2	890	510
Arizona	2,355	2,234	423	429	2,778	2,663
California	118,183	104,157	10,042	9,353	128,225	113,510
Hawaii	49	59	178	154	227	213
Nevada	517	498	56	90	573	588
Oregon	49,394	48,922	2,627	1,155	52,221	50,077
Washington	20,418	19,057	2,484	677	22,902	19,734
Total	191,965	175,435	15,851	11,860	207,816	187,295
Total United States	2,707,387	2,883,479	90,280	85,471	2,797,667	2,968,950

Table 5.--Shipments of petroleum-asphalt and road oil for consumption in the United States, by PAD districts and States

(Short tons)

District and State	Asphalt					Road oil	
	1967						
	Cement and fluxes	Emulsified	Cutback	Total	1966 total	1967 total	1966 total
District 1:							
Connecticut	175,121	6,865	28,056	208,042	234,838	-	-
Delaware	112,387	715	2,418	115,520	117,386	-	-
Florida	686,455	48,779	82,387	817,621	792,186	1,100	-
Georgia	650,140	42,048	104,680	796,888	769,920	-	-
Maine	78,160	8,329	62,077	148,566	163,013	-	-
Maryland and District of Columbia	436,403	29,650	74,888	540,941	583,784	-	159
Massachusetts	494,808	2,631	55,662	553,101	526,265	-	-
New Hampshire	50,700	240	22,151	73,099	97,727	-	-
New Jersey	911,624	25,289	73,337	1,010,252	1,066,346	390	1,016
New York	672,241	143,345	244,544	1,065,130	1,257,265	-	163
North Carolina	486,168	123,540	72,672	682,380	662,748	1,060	887
Pennsylvania	956,789	94,617	200,354	1,251,760	1,157,254	6,496	4,679
Rhode Island	123,066	1,122	12,544	136,732	163,791	-	-
South Carolina	286,951	70,909	21,706	379,566	379,383	-	-
Vermont	32,130	452	25,449	58,031	63,818	-	-
Virginia	306,882	47,135	96,390	450,407	523,455	-	18
West Virginia	65,952	5,476	27,808	99,236	149,726	-	330
Total 1967	6,528,667	609,162	1,307,143	8,435,272	-	7,036	-
Total 1966	6,536,521	834,840	1,296,302	-	8,665,883	-	7,252
District 2:							
Illinois	1,431,686	42,496	220,748	1,894,930	1,960,493	200,195	155,949
Indiana	523,226	207,985	163,444	894,653	833,888	5,462	9,528
Iowa	340,199	39,596	88,532	474,367	502,249	15,460	13,779
Kansas	236,849	22,376	183,257	441,982	503,874	216	125
Kentucky	283,336	105,566	78,087	466,975	414,477	449	10,036
Michigan	677,562	81,748	47,991	807,301	886,390	10,485	9,380
Minnesota	493,071	37,403	132,350	663,224	680,381	16,760	26,846
Missouri	505,861	8,093	297,120	810,294	867,390	91,532	49,234
Nebraska	69,302	695	43,858	113,855	136,921	3,937	2,954
North Dakota	107,503	85,436	55,860	248,767	141,118	18,784	15,584
Ohio	848,289	153,587	367,139	1,369,015	1,398,326	9,510	9,907
Oklahoma	437,100	4,321	171,034	612,455	621,650	18,518	22,585
South Dakota	61,488	6,966	54,373	122,825	121,150	14,568	20,788
Tennessee	480,995	136,544	38,883	655,662	803,642	52	-
Wisconsin	328,132	13,487	101,256	442,873	420,613	119,873	156,996
Total 1967	6,868,965	964,703	2,025,390	9,859,058	-	528,218	-
Total 1966	6,961,276	863,341	2,273,845	-	10,098,462	-	501,774
District 3:							
Alabama	488,487	101,354	38,313	548,354	517,983	26	-
Arkansas	240,829	43,395	66,201	350,335	331,806	706	981
Louisiana	386,889	55,184	21,927	463,920	453,099	1,170	1,056
Mississippi	265,592	15,674	6,854	288,030	232,676	-	-
New Mexico	145,879	10,879	64,825	219,583	291,317	3,682	8,980
Texas	1,444,119	49,290	208,279	1,696,979	1,681,263	32,338	47,672
Total 1967	2,889,895	275,396	399,990	3,323,341	-	37,922	-
Total 1966	2,899,348	274,996	418,688	-	3,592,126	-	57,912
District 4:							
Colorado	269,815	5,986	41,784	317,585	303,489	23,184	16,325
Idaho	97,385	6,933	40,581	104,881	125,416	15,665	6,739
Montana	127,865	13,633	48,452	189,730	176,983	16,798	11,583
Utah	160,426	510	33,870	194,806	221,793	11,973	12,668
Wyoming	70,234	269	29,387	99,890	111,981	9,406	6,792
Total 1967	681,725	27,113	194,054	902,892	-	73,026	-
Total 1966	693,365	36,661	231,396	-	939,582	-	54,041
District 5:							
Alaska	17,407	2,733	4,536	24,676	48,861	-	63
Arizona	167,545	49,396	45,503	262,444	267,905	99,690	96,367
California	1,659,118	126,299	113,897	1,899,314	2,037,381	211,125	262,844
Hawaii	37,963	577	2,747	41,287	50,879	217	218
Nevada	99,776	4,981	20,076	123,913	119,147	17,711	21,833
Oregon	269,236	31,176	29,386	329,698	422,742	21,877	13,560
Washington	290,854	15,348	80,882	392,454	413,337	16,649	10,871
Total 1967	2,543,829	270,910	296,963	3,009,884	-	367,269	-
Total 1966	2,713,859	279,687	368,606	-	3,361,152	-	423,956
Total United States 1967	19,503,551	2,176,144	4,122,922	25,802,667	-	1,013,432	-
Total United States 1966	19,603,349	2,386,825	4,567,839	-	26,637,603	-	1,044,935

[App. B to Appellants' Opening Brief]

MINERAL INDUSTRY SURVEYS

U.S. Dept. of the Interior,

Bureau of Mines

[Masthead]

SHIPMENTS OF ASPHALT IN 1968

Petroleum Asphalt:

Domestic shipments of asphalt and asphaltic products in 1968 amounted to 28,379,354 short tons, 10.0 percent above the 25,802,667 short tons shipped in 1967. Shipments of road oil in 1968 totaled 1,153,677 short tons, an 11.6 percent increase over the total shipments in 1967, according to the Bureau of Mines, United States Department of the Interior.

In 1968, asphalt for paving increased 9.7 percent over the previous year. Asphalt for paving accounted for 72.9 percent of total domestic shipments followed by roofing and miscellaneous use with 16.8 and 10.3 percent, respectively.

Shipments of asphaltic cements and fluxes amounted to 21,855,319 short tons or 77.0 percent of the asphalt shipments in 1968. Emulsified and cutback asphalts accounted for the remaining 23.0 percent.

Native Asphalt:

Gilsonite, and bituminous limestone and sandstone shipments in 1968 totaled 1,786,840 short tons valued at $8,127,000.

Petroleum asphalt, including natural, imported in 1968 totaled 1,134,000 short tons, 3.2 percent less than the 1,172,000 short tons imported in 1967. Exports in 1968 were 86,000 short tons, 3.6 percent greater than the final 1967 export total of 83,000 short tons.

Prepared June 17, 1969 in Mineral Resource Evaluation.

Table 1.—Shipments of petroleum asphalt for consumption in the United States, by type and principal use[1]

(Short tons)

	1964	1965	1966	1967	1968
United States, total	24,045,860	25,027,723	26,437,603	25,802,667	28,379,354
By type:					
Asphalt cements and fluxes	17,856,662	18,519,011	19,603,749	19,503,551	21,855,319
Emulsified asphalts	1,832,389	2,080,876	2,266,825	2,176,194	2,269,304
Cutback asphalts	4,356,789	4,427,836	4,567,029	4,122,922	4,254,731
By principal use:					
Paving products	17,366,521	18,441,367	19,648,172	18,866,855	20,689,912
Roofing products	4,216,846	4,030,873	3,991,764	3,966,862	4,767,042
All other products	2,462,493	2,555,483	2,797,667	2,968,950	2,922,400

1. Excludes domestic bituminous limestone and sandstone, gilsonite and road oil.

Table 3.--Shipments of petroleum-asphalt paving products for consumption in the United States, by F.A.D. Districts and States

(Short tons)

District and State	Asphalt cements		Cutback asphalts		Emulsified asphalts		Total	
	1967	1968	1967	1968	1967	1968	1967	1968
District I:								
Connecticut	138,789	166,378	28,056	30,744	4,291	4,232	171,116	201,354
Delaware	19,426	26,673	2,418	2,758	691	1,714	22,545	31,151
Florida	475,252	469,709	82,387	75,353	47,923	37,654	605,562	582,712
Georgia	377,170	395,006	104,680	78,247	41,147	55,026	522,997	528,277
Maine	75,862	72,831	62,077	53,954	8,101	14,834	146,040	141,619
Maryland and District of Columbia	308,249	291,929	74,888	75,557	78,067	61,372	461,204	428,858
Massachusetts	327,845	287,125	55,662	52,487	323	408	383,830	340,020
New Hampshire	50,693	59,755	22,151	41,232	81	91	72,925	101,078
New Jersey	401,322	409,250	73,337	83,346	24,336	30,511	499,015	523,107
New York	617,432	619,998	244,344	229,456	140,179	113,972	1,002,155	963,426
North Carolina	372,027	395,394	72,672	74,177	121,358	116,979	566,257	586,550
Pennsylvania	600,311	661,447	200,354	199,041	87,980	76,571	888,645	935,059
Rhode Island	103,773	190,667	12,564	10,818	824	443	117,161	201,928
South Carolina	220,269	196,471	21,706	19,134	56,876	60,016	298,849	275,641
Vermont	31,737	39,745	25,449	24,952	423	643	57,609	65,340
Virginia	282,926	312,743	98,390	98,084	45,412	67,298	426,728	478,125
West Virginia	64,381	68,926	27,808	30,716	5,331	11,434	97,520	111,076
District I, total	4,467,454	4,644,247	1,207,143	1,180,076	663,561	651,198	6,338,158	6,475,521
District II:								
Illinois	334,998	619,323	220,748	304,933	33,542	41,295	589,288	965,551
Indiana	297,213	330,861	163,444	200,122	207,273	230,402	667,930	781,385
Iowa	337,619	339,826	88,552	104,344	37,411	38,246	463,582	482,414
Kansas	223,900	136,386	183,357	197,098	22,561	28,849	429,818	362,333
Kentucky	259,136	358,345	78,087	60,849	105,067	114,224	442,290	533,438
Michigan	347,362	421,273	47,851	43,074	77,891	79,055	473,204	543,402
Minnesota	289,532	334,755	132,550	123,953	36,889	30,687	458,991	489,395
Missouri	224,040	286,359	297,120	385,591	3,828	7,719	526,988	679,669
Nebraska	58,413	80,171	43,858	56,480	584	2,245	102,857	138,896
North Dakota	103,708	106,690	55,840	59,600	85,417	73,710	244,965	236,000
Ohio	503,675	658,821	347,139	317,073	145,402	181,499	996,216	1,157,393
Oklahoma	314,130	381,426	171,034	167,042	4,306	6,509	489,472	555,017
South Dakota	56,488	67,623	36,373	40,761	4,964	13,797	117,825	122,181
Tennessee	394,318	489,466	38,083	52,996	136,349	134,032	568,750	676,494
Wisconsin	274,699	275,380	101,254	62,977	11,204	20,173	387,157	358,530
District II, total	3,999,253	4,906,703	2,025,390	2,172,953	914,690	1,002,442	6,939,333	8,082,098
District III:								
Alabama	228,003	221,607	38,313	31,326	100,484	89,281	366,800	342,214
Arkansas	112,418	152,765	66,201	64,201	43,084	38,031	221,703	254,997
Louisiana	175,228	110,229	21,927	19,842	54,243	40,270	251,398	170,341
Mississippi	240,224	234,657	6,854	7,491	13,370	17,898	262,448	260,046
New Mexico	136,633	195,733	64,825	64,199	9,974	10,876	211,432	270,808
Texas	824,944	809,764	201,270	202,557	43,578	30,108	1,069,792	1,062,429
District III, total	1,717,450	1,724,755	399,390	389,616	266,733	246,464	2,383,573	2,360,835
District IV:								
Colorado	220,421	327,384	41,786	72,478	5,960	6,888	268,165	406,750
Idaho	53,752	60,124	40,361	31,132	6,909	8,346	101,222	99,602
Montana	124,368	154,382	48,452	47,241	13,432	16,330	186,452	218,353
Utah	139,762	131,014	33,870	36,614	348	4,841	173,980	172,469
Wyoming	68,909	147,293	29,387	39,693	349	186	98,345	187,172
District IV, total	607,412	820,397	194,054	227,158	26,898	36,791	828,364	1,084,346
District V:								
Alaska	16,294	14,438	4,336	3,521	2,731	1,182	23,521	19,161
Arizona	163,200	223,405	45,503	48,155	48,967	54,146	259,670	325,706
California	1,132,309	1,332,817	113,897	118,036	116,813	130,397	1,363,019	1,581,250
Hawaii	32,259	42,030	2,767	2,548	421	460	35,447	45,038
Nevada	98,096	66,230	20,076	11,620	3,970	4,778	122,142	82,628
Oregon	181,712	183,190	29,284	37,719	30,018	33,246	241,014	254,155
Washington	236,940	292,744	80,882	63,329	14,792	23,081	332,614	379,154
District V, total	1,862,770	2,134,894	296,945	284,928	217,712	247,290	2,377,427	2,687,112
United States, total	12,654,339	14,230,996	4,122,922	4,254,731	2,089,594	2,184,185	18,866,855	20,689,912

Table 3.--Shipments of petroleum-asphalt roofing products for consumption in the United States, by P.A.D. Districts and States

(Short tons)

District and State	Asphalt cement and fluxes		Emulsified asphalts		Total	
	1967	1968	1967	1968	1967	1968
District I:						
Connecticut	2,778	5,637	-	-	2,778	5,637
Delaware	91,861	79,874	-	-	91,861	79,874
Florida	130,536	135,481	3	19	130,539	135,500
Georgia	148,307	145,457	11	-	148,318	145,457
Maine	145	112	-	-	145	112
Maryland and District of Columbia	80,581	81,489	97	181	80,678	81,670
Massachusetts	89,648	90,198	2	23	89,650	90,221
New Hampshire	-	-	-	-	-	-
New Jersey	240,597	254,840	2	1	240,599	254,841
New York	19,665	31,248	-	12	19,665	31,260
North Carolina	46,477	49,518	-	13	46,477	49,531
Pennsylvania	261,821	286,314	238	306	262,059	286,320
Rhode Island	10,241	4,652	-	-	10,241	4,652
South Carolina	64,583	80,215	35	19	64,618	80,234
Vermont	1	-	-	-	1	-
Virginia	10,522	8,314	-	4	10,522	8,318
West Virginia	1,031	44,873	-	32	1,031	44,905
District I, total	1,198,994	1,298,222	388	510	1,199,382	1,298,732
District II:						
Illinois	486,871	734,996	-	-	486,871	734,996
Indiana	136,419	159,474	-	14	136,419	159,488
Iowa	2,704	2,730	-	139	2,704	2,869
Kansas	21,839	22,272	-	-	21,839	22,272
Kentucky	9,588	10,246	-	1	9,588	10,247
Michigan	85,988	103,038	-	3	85,988	103,041
Minnesota	133,698	138,490	-	-	133,698	138,490
Missouri	218,643	197,975	-	119	218,643	198,094
Nebraska	5,410	4,614	-	-	5,410	4,614
North Dakota	3,159	3,649	-	-	3,159	3,649
Ohio	199,148	601,322	22	4,721	199,170	606,043
Oklahoma	85,248	43,388	-	-	85,248	43,388
South Dakota	2,613	2,490	-	-	2,613	2,490
Tennessee	45,395	52,787	-	-	45,395	52,787
Wisconsin	11,165	10,937	-	-	11,165	10,937
District II, total	1,447,888	2,088,408	22	4,997	1,447,910	2,093,405
District III:						
Alabama	158,582	153,135	189	937	158,771	154,072
Arkansas	113,604	129,251	-	-	113,604	129,251
Louisiana	119,407	123,227	18	1	119,425	123,228
Mississippi	11,528	8,325	-	-	11,528	8,325
New Mexico	7,540	14,818	-	-	7,540	14,818
Texas	337,348	366,689	17	1	337,365	366,690
District III, total	748,009	795,445	224	939	748,233	796,384
District IV:						
Colorado	42,504	40,323	5	-	42,509	40,323
Idaho	3,414	3,094	-	7	3,414	3,101
Montana	3,200	3,100	-	-	3,200	3,100
Utah	15,872	16,413	152	-	16,024	16,413
Wyoming	1,028	1,250	-	-	1,028	1,250
District IV, total	66,018	64,180	157	7	66,175	64,187
District V:						
Alaska	645	2,123	-	8	645	2,131
Arizona	111	1	-	-	111	1
California	418,652	416,975	233	239	418,885	417,214
Hawaii	5,625	6,269	2	36	5,627	6,304
Nevada	1,182	847	1	1	1,183	848
Oregon	38,602	41,726	3	67	38,605	41,793
Washington	40,007	45,697	99	346	40,106	46,043
District V, total	504,824	513,637	338	697	505,162	514,334
United States, total	3,965,733	4,759,892	1,129	7,150	3,966,862	4,767,042

Table 4.--Shipments of all other petroleum-asphalt products for consumption in the United States, by P.A.D. Districts and States

(Short tons)

District and State	Asphalt cements and fluxes		Emulsified asphalts		Total	
	1967	1968	1967	1968	1967	1968
District I:						
Connecticut	33,574	35,324	574	1,007	34,148	36,331
Delaware	1,090	16,994	24	24	1,114	17,018
Florida	80,667	117,167	853	995	81,520	118,162
Georgia	124,463	104,045	910	899	125,373	104,944
Maine	2,153	2,360	228	193	2,381	2,553
Maryland and District of Columbia	45,573	34,968	1,486	1,600	47,059	36,568
Massachusetts	77,315	75,170	2,306	1,914	79,621	77,084
New Hampshire	13	208	159	62	174	270
New Jersey	269,707	293,440	931	1,016	270,638	294,456
New York	40,144	28,581	3,166	2,645	43,310	31,226
North Carolina	67,664	64,814	1,982	1,486	69,646	66,300
Pennsylvania	94,657	92,402	6,399	6,256	101,056	98,658
Rhode Island	9,032	6,044	298	259	9,330	6,303
South Carolina	2,099	16,108	14,000	91	16,099	16,199
Vermont	392	1,105	29	29	421	1,134
Virginia	13,434	12,925	1,723	3,552	15,157	16,477
West Virginia	540	728	145	126	685	854
District I, total	862,319	902,383	35,213	22,154	897,732	924,537
District II:						
Illinois	809,817	676,704	8,954	14,849	818,771	691,553
Indiana	89,592	109,310	712	473	90,304	109,783
Iowa	5,876	5,474	2,185	1,112	8,061	6,586
Kansas	10,310	14,003	15	29	10,325	14,032
Kentucky	14,600	1,233	497	655	15,097	1,890
Michigan	44,212	53,349	3,857	5,088	48,069	58,437
Minnesota	89,821	18,972	714	695	90,535	19,667
Missouri	62,358	40,201	3,265	3,218	64,623	43,419
Nebraska	5,477	7,939	111	510	5,588	8,449
North Dakota	636	661	7	31	643	692
Ohio	165,466	184,541	8,163	4,240	173,629	188,781
Oklahoma	37,722	40,257	13	208	37,735	40,465
South Dakota	2,387	526	-	-	2,387	526
Tennessee	41,282	34,817	215	345	41,497	35,162
Wisconsin	42,264	27,898	2,283	1,124	44,551	29,014
District II, total	1,421,824	1,216,099	29,991	32,577	1,451,815	1,248,676
District III:						
Alabama	13,902	21,877	881	804	14,783	22,681
Arkansas	14,807	17,704	221	160	15,028	17,864
Louisiana	90,254	132,061	843	444	91,097	132,505
Mississippi	13,750	10,506	304	303	14,054	10,809
New Mexico	844	3,052	105	162	971	3,214
Texas	281,927	344,486	5,995	7,748	287,822	352,234
District III, total	415,606	529,686	8,349	9,621	423,755	539,307
District IV:						
Colorado	2,890	4,623	21	192	2,911	4,815
Idaho	199	331	26	47	225	378
Montana	97	146	1	9	98	155
Utah	4,792	5,244	10	6	4,802	5,250
Wyoming	317	147	-	-	317	147
District IV, total	8,293	10,491	58	254	8,353	10,745
District V:						
Alaska	508	937	2	183	510	1,120
Arizona	2,234	2,237	429	344	2,663	2,581
California	104,157	111,614	9,353	9,956	113,510	121,570
Hawaii	59	66	154	381	213	447
Nevada	498	707	90	247	588	954
Oregon	48,922	50,038	1,155	1,443	50,077	51,481
Washington	19,057	20,173	677	809	19,734	20,982
District V, total	175,435	185,772	11,860	13,363	187,295	199,135
United States, total	2,883,479	2,844,431	85,471	77,969	2,968,950	2,922,400

Table 1.--Shipments of petroleum-asphalt and road oil for consumption in the United States, by P.A.D. Districts and States

(Short tons)

District and State	Asphalts					Road oil	
	1968				1967	1968	1967
	Cement and fluxes	Emulsified	Cutback	Total	Total	Total	Total
District I:							
Connecticut	207,539	5,239	30,744	243,522	208,042	-	-
Delaware	123,543	1,738	2,758	128,039	115,520	-	-
Florida	702,357	38,668	75,353	816,378	817,621	484	1,100
Georgia	644,506	55,925	78,247	778,678	796,888	-	-
Maine	75,303	15,027	53,954	144,284	148,566	-	-
Maryland and District of Columbia	408,386	63,153	75,557	547,096	588,941	-	-
Massachusetts	452,483	2,345	52,487	507,325	553,101	-	-
New Hampshire	59,963	153	41,232	101,348	73,099	-	-
New Jersey	937,330	31,528	83,346	1,072,404	1,010,252	108	390
New York	679,827	116,629	229,456	1,025,912	1,065,130	481	-
North Carolina	509,726	118,478	74,177	702,381	682,380	-	1,040
Pennsylvania	1,040,163	81,033	199,041	1,320,237	1,251,760	4,275	4,494
Rhode Island	201,363	702	10,818	212,883	136,732	-	-
South Carolina	292,794	60,126	19,154	372,074	379,566	-	-
Vermont	40,850	672	24,952	66,474	58,031	-	-
Virginia	333,982	70,854	98,084	502,920	450,407	56	-
West Virginia	114,527	11,592	30,716	156,835	99,236	113	-
District I, total, 1968	6,844,852	673,862	1,180,076	8,698,790	-	5,517	-
District I, total, 1967	6,528,967	699,162	1,207,143	-	8,435,272	-	7,024
District II:							
Illinois	2,031,023	56,144	304,933	2,392,100	1,894,930	199,997	200,185
Indiana	619,645	230,889	200,122	1,050,656	894,653	16,963	5,662
Iowa	348,028	39,497	104,344	491,869	474,347	14,088	13,460
Kansas	172,661	28,878	197,098	398,637	461,982	162	216
Kentucky	369,826	114,880	60,859	545,575	466,975	10,458	463
Michigan	577,880	84,146	43,074	705,100	607,261	14,000	10,685
Minnesota	492,217	31,382	123,953	647,552	663,224	82,591	18,760
Missouri	524,535	11,056	385,591	921,182	810,254	50,802	91,532
Nebraska	92,724	2,755	56,480	151,959	113,855	5,147	3,937
North Dakota	111,000	73,741	55,600	240,341	248,767	18,339	18,786
Ohio	1,444,684	190,460	317,073	1,952,217	1,369,015	7,340	9,510
Oklahoma	465,071	6,717	167,082	638,870	612,455	20,537	18,518
South Dakota	70,639	13,797	40,761	125,197	122,825	14,749	14,568
Tennessee	577,070	134,377	52,996	764,443	655,642	2,015	51
Wisconsin	314,207	21,297	62,977	398,481	442,873	148,404	119,875
District II, total, 1968	8,211,210	1,040,016	2,172,953	11,424,179	-	605,592	-
District II, total, 1967	6,768,965	944,703	2,025,390	-	9,839,058	-	928,218
District III:							
Alabama	395,619	91,022	31,326	518,967	540,354	141	26
Arkansas	299,720	38,194	64,201	402,112	350,335	2,487	706
Louisiana	365,517	40,715	19,842	426,074	461,920	1,489	1,170
Mississippi	253,688	18,201	7,491	279,180	288,030	-	-
New Mexico	213,603	11,038	64,199	288,840	219,943	3,294	3,482
Texas	1,520,939	57,857	202,557	1,781,353	1,694,979	67,812	52,538
District III, total, 1968	3,049,886	257,026	389,616	3,696,526	-	75,223	-
District III, total, 1967	2,880,865	275,306	399,390	-	3,555,561	-	57,922
District IV:							
Colorado	372,330	7,080	72,478	451,888	313,585	29,760	23,164
Idaho	63,349	8,400	31,132	103,081	104,861	29,370	15,665
Montana	157,828	16,339	47,241	221,408	189,750	19,425	14,798
Utah	152,671	4,847	36,614	194,132	194,806	9,022	11,973
Wyoming	148,690	186	39,693	188,369	99,890	12,665	9,404
District IV, total, 1968	895,068	37,052	227,158	1,159,278	-	100,242	-
District IV, total, 1967	681,725	27,113	194,054	-	902,892	-	75,004
District V:							
Alaska	17,518	1,373	3,521	22,412	24,676	363	-
Arizona	225,643	34,490	48,155	328,288	262,444	107,890	99,690
California	1,861,406	140,592	118,036	2,120,034	1,895,414	215,079	211,125
Hawaii	48,384	877	2,548	51,809	41,287	413	217
Nevada	67,784	5,726	11,620	84,430	123,913	18,329	17,711
Oregon	274,934	34,756	37,719	347,429	329,696	20,412	21,877
Washington	328,614	24,234	63,329	446,179	392,454	4,617	14,649
District V, total, 1968	2,824,303	261,350	284,928	3,400,581	-	367,103	-
District V, total, 1967	2,543,029	229,910	296,965	-	3,069,884	-	365,269
United States, total, 1968	21,825,319	2,269,304	4,254,731	28,379,354	-	1,153,677	-
United States, total, 1967	19,403,351	2,176,194	4,122,922	-	25,802,667	-	1,033,437

NO. 72-2152

In the United States Court of Appeals
for the Ninth Circuit

[Filed February 5, 1973]

In Re Coordinated Pre-Trial Proceedings In Western Liquid Asphalt Cases

Copp Paving Company, Inc.; Copp Equipment Company, Inc.; and Ernest A. Copp,
Appellants,

vs.

Gulf Oil Company; Union Oil Company of California; Industrial Asphalt, Inc.; Sully-Miller Contracting Company; and Edgington Oil Company,
Respondents.

APPELLANTS' REPLY BRIEF

Corinblit and Shapero
By: Martin M. Shapero
Beneficial Plaza Building
Suite 575
3700 Wilshire Boulevard
Los Angeles, CA 90005
(213) 380-4200
Attorneys for Appellants

[Text of Appellants' Reply Brief, and Appendix I thereto not designated]

[Appendix II to Appellants' Reply Brief follows]

No. 884. Designated Federal-Aid Highway Systems, 1970, and Projects, 1971—States and Puerto Rico

[Systems as of December 31, and projects as of June 30. Projects comprise those financed from the Federal-aid primary, secondary, urban, rural, TOPICS (urban traffic operations program to increase capacity and safety), and Interstate funds. See text, pp. 533 and 534]

State or other area	Systems (miles), 1970					Projects, 1971[1]					
		Primary				Completed during fiscal year			Under construction		
	Total	National system of interstate highways		Secondary		Miles	Total cost (mil. dol.)	Federal funds (mil. dol.)	Miles	Total cost (mil. dol.)	Federal funds (mil. dol.)
		Total	Open to traffic								
Total	371,817	42,568	31,543	647,492		11,845	5,010	3,818	15,867	16,980	11,773
United States	370,960	42,568	31,543	646,286		11,344	4,904	3,615	15,222	16,210	11,709
Alabama	6,254	856	691	15,533		147	61	57	228	441	263
Alaska	2,033			2,100		106	57	45	204	61	53
Arizona	4,637	1,172	671	7,687		175	87	69	104	128	119
Arkansas	6,117	658	453	14,977		187	83	60	164	180	107
California	9,587	2,266	1,781	15,106		300	240	200	1,238	1,118	1,118
Colorado	8,013	975	720	4,302		198	84	67	232	138	124
Connecticut	1,930	347	270	1,366		14	14	13	16	28	25
Delaware	1,000	41	30	1,670		4	2	2	2	2	2
Dist. of Columbia	158	30	30	127		2	1	1	2	2	2
Florida	6,998	1,897	947	15,072		310	150	135	275	335	302
Georgia	9,121	1,142	720	20,284		335	119	95	557	251	225
Idaho	4,003	433	181	6,686		91	61	55	211	135	121
Illinois	16,874	1,794	1,280	16,074		440	180	162	1,447	415	374
Indiana	9,673	1,134	875	10,014		100	110	99	1,100	212	191
Iowa	10,961	781	547	23,033		882	157	141	1,447	177	159
Kansas	9,344	733	554	24,607		345	110	99	1,100	224	202
Kentucky	7,648	733	554	14,159		60	73	66	1,100	84	76
Louisiana	7,198	313	270	8,922		221	73	66	1,100	84	76
Maine	2,437	254	254	7,777		344	124	112	1,100	84	76
Maryland	2,437	1,115	1,115	2,884		221	124	112	1,100	84	76
Massachusetts	2,437	1,115	1,115	2,884		221	124	112	1,100	84	76
Michigan	9,000	1,115	875	16,775		221	124	112	1,100	84	76
Minnesota	9,000	1,115	875	16,775		221	124	112	1,100	84	76
Mississippi	6,000	1,115	875	16,775		221	124	112	1,100	84	76
Missouri	6,000	1,147	900	25,940		190	117	105	327	227	204
Montana	6,000	1,147	900	17,000		238	134	121	327	227	204
Nebraska	6,000	1,147	900	17,000		238	134	121	327	227	204
Nevada	6,000	1,147	900	17,000		238	134	121	327	227	204
New Hampshire	6,000	1,147	900	17,000		238	134	121	327	227	204
New Jersey	6,000	1,147	900	17,000		238	134	121	327	227	204
New Mexico	6,000	1,147	900	17,000		238	134	121	327	227	204
New York	6,000	1,147	900	17,000		238	134	121	327	227	204
North Carolina	6,000	1,147	900	17,000		238	134	121	327	227	204
North Dakota	6,000	1,147	900	17,000		238	134	121	327	227	204
Ohio	6,000	1,147	900	17,000		238	134	121	327	227	204
Oklahoma	6,000	1,147	900	17,000		238	134	121	327	227	204
Oregon	6,000	1,147	900	17,000		238	134	121	327	227	204
Pennsylvania	6,000	1,147	900	17,000		238	134	121	327	227	204
Rhode Island	6,000	1,147	900	17,000		238	134	121	327	227	204
South Carolina	6,000	1,147	900	17,000		238	134	121	327	227	204
South Dakota	6,000	1,147	900	17,000		238	134	121	327	227	204
Tennessee	6,000	1,147	900	17,000		238	134	121	327	227	204
Texas	6,000	1,147	900	17,000		238	134	121	327	227	204
Utah	6,000	1,147	900	17,000		238	134	121	327	227	204
Vermont	6,000	1,147	900	17,000		238	134	121	327	227	204
Virginia	6,000	1,147	900	17,000		238	134	121	327	227	204
Washington	6,000	1,147	900	17,000		238	134	121	327	227	204
West Virginia	6,000	1,147	900	17,000		238	134	121	327	227	204
Wisconsin	6,000	1,147	900	17,000		238	134	121	327	227	204
Wyoming	6,000	1,147	900	17,000		238	134	121	327	227	204
Puerto Rico	857	0	0	1,206		0	0	0	0	0	0

Represents zero.
[1] Excludes highway planning and research work financed with 1½ percent Federal-aid highway funds available pursuant to 23 U.S.C. 307(c)(2). (Completed, $46 million total cost, $35 million Federal funds; underway, $363 million total cost, $306 million Federal funds.)

Source: U.S. Federal Highway Administration, *Federal Aid and Allied Highway Programs*, 1971.

...n—Land

...and Local Governments for Highway ...erto Rico: 1960 to 1971

...years ending June 30]

State or other area	1960	1965	1969	1970	1971
Mont.					
Nebr.					
Nev.					
N.H.					
N.J.					
N. Mex.					
N.Y.					
N.C.					
N. Dak.					
Ohio					
Okla.					
Oreg.					
Pa.					
R.I.					
S.C.					
S. Dak.					
Tenn.					
Tex.					
Utah					
Vt.					
Va.					
Wash.					
W. Va.					
Wis.					
Wyo.					
Undist. to States, etc.					
P.R.					

...ectively. In millions of dollars. Apportionment, highway ...ramping and outside urban allotment, U.S. and S. and high...

...d Report of the Secretary of the Treasury on the State of

Term Highway Obligations of State ...rts: 1950 to 1972

[Data are for varying fiscal years, 1960 excludes Alaska ...ions, except as noted. Municipal obligations included ...s urban in character. See *Historical Statistics, Colonial ...ial*]

	1950	1960	1970	1971 (prel.)	1972 est.

SECTION J

TRANSPORTATION

Statistics relating to the mileage of roads, expenditures to construct and maintain these roads, gallons of fuel used, and traffic and accident data on all freeways and on rural State highways were compiled for publication by the Urban Planning Department of the Division of Highways, Department of Public Works.

The accident statistics contained in this report are based upon fatal and injury accidents involving a motor vehicle. The reports from which these statistics are compiled are those required to be reported to the California Highway Patrol under Section 20008 of the Vehicle Code. Accidents involving "property damage only" are not required to be reported and, consequently, do not reflect an accurate total.

In addition to the accident data contained in this report for 1970, the Department of California Highway Patrol also received an additional 5,929 reports of motor vehicle accidents which occurred on private property. These accidents resulted in death for 176 persons and injury to 6,907 persons.

World Trade Statistics

The dollar value of foreign trade, as compiled by the United States Department of Commerce, is presented for the three customs districts: Los Angeles, San Diego, and San Francisco.

Leading exports are: food and live animals, with fruit and dried milk playing an important role; crude materials, with raw cotton the number one export; chemicals, including inorganic and hydrocarbons; and machinery and transportation equipment, including non-electrical machine appliances.

Leading imports are: food products, half of which is green coffee; mineral fuels, mostly petroleum; manufactured goods, including newsprint and iron and steel plate; and machinery and transportation equipment, including automobiles and telecommunication equipment. Textile clothing is also becoming an important import.

The statistics on tonnage of inbound and outbound oceanborne cargo were compiled from U.S. Department of Commerce publications.

Other information sources on California world trade and shipping may be obtained from World Trade Center Libraries, San Francisco.

TABLE J-1

STATE HIGHWAY MILEAGE, BY SURFACE TYPE[a] DECEMBER 31, 1970

(Note: Data in this table update the series shown in Tables J-1 and J-7 in the 1970 *California Statistical Abstract*.)

Surface type	Total	Outside cities	Inside cities
Total	16,748	14,148	2,600
Total constructed road	14,568	12,334	2,234
Portland cement concrete	2,315	1,477	838
High type bituminous	9,174	7,929	1,245
Low type bituminous	2,138	2,096	42
Oiled earth, gravel	804	801	3
Graded and drained earth	19	19	0
Bridges	238	134	104
Unconstructed roads	2,179	1,813	366

[a] Centerline mileage only which does not include roadd mileage such as frontage roads, connections, etc.

Business and Transportation Agency
Department of Public Works
Division of Highways, Urban Planning Department

TABLE J-2

STATE HIGHWAY MILEAGE, BY TRAFFIC VOLUME GROUPS, DECEMBER 31, 1970

(Note: Data in this table update the series shown in Table J-2 in the 1970 *California Statistical Abstract*.)

Traffic volume group	Total	Outside cities	Inside cities
Total	14,568	12,334	2,234
Under 400 vehicles per day	1,179	1,179	0
400- 999	2,260	2,253	6
1,000- 1,999	2,243	2,211	32
2,000- 2,200	1,240	1,207	43
3,000- 3,999	1,148	1,106	42
4,000- 4,999	910	861	49
5,000- 9,999	1,794	1,548	246
10,000-14,999	908	671	237
15,000-19,999	458	266	192
20,000-29,999	908	489	419
30,000-39,999	262	131	131
40,000 and over	940	218	722

Business and Transportation Agency
Department of Public Works
Division of Highways, Urban Planning Department

TABLE J-3

HIGHWAY TRAFFIC ENTERING CALIFORNIA THROUGH STATE BORDER QUARANTINE STATIONS, 1970[a]

(Note: Data in this table update the series shown in Table J-8 in the 1970 *California Statistical Abstract*.)

Type of vehicle	Number
Total	9,543,063
Automobiles and buses[b]	8,906,356
Trucks	636,707

[a] Data relate to 1970 calendar year, and therefore differ from state totals shown in Table J-6.
[b] Buses were incorporated with automobiles effective 1970.

Department of Agriculture
Bureau of Plant Quarantine

Source: California Statistical Abstract - 1971

TABLE J-7

CALIFORNIA STATE HIGHWAY SYSTEM, LENGTH IN MILES, 1909-69

Year	Authorized by Legislature	In service		
		Total	Outside cities	Inside cities
1909	3,052	n.a.	n.a.	n.a.
1916	3,754	n.a.	n.a.	n.a.
1919	5,607	n.a.	n.a.	n.a.
1920	6,168	n.a.	n.a.	n.a.
1922	6,400	n.a.	n.a.	n.a.
1924	6,400	n.a.	n.a.	n.a.
1926	6,589	n.a.	n.a.	n.a.
1928	6,565	n.a.	n.a.	n.a.
1930	6,581	n.a.	n.a.	n.a.
1931	7,332	n.a.	n.a.	n.a.
1932	7,347	n.a.	n.a.	n.a.
1934	14,019	13,651	12,651	953
1936	13,871	13,582	12,554	1,028
1938	13,913	13,647	12,613	1,034
1940	13,865	13,642	12,593	1,049
1942	13,867	13,678	12,621	1,057
1944	13,895	13,705	12,645	1,060
1945	13,886	13,717	12,644	1,073
1946	13,892	13,698	12,630	1,068
1947	13,874	13,694	12,687	1,007
1948	13,970	13,733	12,630	1,103
1949	13,994	13,730	12,603	1,127
1950	13,999	13,732	12,581	1,151
1951	13,986	13,445	12,338	1,107
1952	14,223	13,715	12,536	1,179
1953	14,313	13,754	12,547	1,207
1954	14,314	13,769	12,538	1,231
1955	14,279	13,730	12,467	1,263
1956	14,327	13,758	12,388	1,370
1957	14,310	13,771	12,331	1,440
1958	14,482	13,883	12,337	1,546
1959	14,584	14,019	12,419	1,610
1960	14,307	14,034	12,339	1,695
1961	14,388	14,128	12,394	1,734
1962	14,371	14,165	12,368	1,797
1963	14,417	14,173	12,344	1,829
1964	14,415	14,180	12,282	1,918
1965	14,598	14,215	12,249	1,966
1966	14,548	14,264	12,243	2,021
1967	14,599	14,332	12,272	2,060
1968	14,484	14,397	12,282	2,115
1969	14,476	14,501	12,308	2,193

n.a. Not available.
Business and Transportation Agency
Department of Public Works
Division of Highways, Urban Planning Department

TABLE J-8

HIGHWAY TRAFFIC ENTERING CALIFORNIA THROUGH STATE BORDER QUARANTINE STATIONS, 1924-69

Year	Number of vehicles			
	Total	Automobiles	Trucks	Buses
1924	88,671	88,671	--	--
1925	125,542	125,542	--	--
1926	158,595	158,595	--	--
1927	198,675	198,675	--	--
1928	229,854	229,854	--	--
1929	537,417	537,417	--	--
1930	676,052	676,052	--	--
1931	847,320	847,320	--	--
1932	788,609	788,609	--	--
1933	745,108	742,419	--	2,689
1934	899,513	886,243	--	13,270
1935	1,113,510	1,098,511	--	14,999
1936	1,371,986	1,280,331	73,518	18,057
1937	1,612,823	1,520,534	73,801	18,486
1938	1,382,579	1,283,800	80,565	18,214
1939	1,483,936	1,375,891	89,049	19,016
1940	1,631,643	1,509,720	103,073	18,850
1941	1,897,709	1,761,964	114,711	21,034
1942	1,550,744	1,408,394	115,859	26,491
1943	1,042,554	908,091	103,160	31,303
1944	939,666	804,398	101,117	34,151
1945	1,619,527	1,478,830	106,872	35,825
1946	2,669,083	2,491,033	134,713	43,338
1947	2,105,610	1,920,882	140,784	43,944
1948	2,267,364	2,051,581	168,575	46,208
1949	2,242,131	2,021,126	179,324	41,681
1950	2,630,548	2,364,641	226,851	39,056
1951	3,069,226	2,732,124	272,691	44,411
1952	3,374,920	3,067,594	266,977	40,389
1953	3,758,321	3,436,508	274,939	46,474
1954	3,835,242	3,492,068	297,714	45,460
1955	4,119,720	3,793,664	319,774	46,282
1956	4,429,231	4,016,737	365,295	47,239
1957	4,476,857	4,052,006	375,800	49,051
1958	4,734,770	4,302,826	383,543	48,401
1959	5,165,246	4,711,648	406,197	47,401
1960	5,378,204	4,821,084	407,107	50,013
1961	6,234,339	5,770,027	413,695	50,617
1962	7,820,338	7,227,681	435,993	57,642
1963	8,921,629	8,610,150	454,520	56,559
1964	9,525,854	9,008,273	471,485	53,996
1965	9,996,100	9,454,219	489,965	51,916
1966	10,495,015	9,925,488	518,762	50,765
1967	10,640,299	10,044,755	542,779	50,765
1968	10,809,720	10,247,986	593,135	48,599
1969	9,569,504	8,921,184	627,832	20,488

Department of Agriculture
Bureau of Plant Quarantine

TABLE J-9

HIGHWAY TRAFFIC ENTERING CALIFORNIA THROUGH STATE BORDER QUARANTINE STATIONS, BY STATION, JULY 1, 1968 THROUGH JUNE 30, 1969

Station	Highway	Number of vehicles			
		Total	Automobiles	Trucks	Buses
Total		10,813,726	10,152,958	614,374	46,394
Alturas	U. S. 395	153,551	151,154	2,389	8
Borrie	U. S. 97	349,261	329,346	18,034	1,881
Hornbrook	Interstate 5	1,050,630	978,101	66,785	5,744
Redwood Highway	U. S. 199	236,365	233,011	2,886	466
Smith River	U. S. 101	441,589	437,935	2,640	1,040
Tule Lake	State 139	110,620	107,280	2,527	813
Benton[a]	U. S. 6	103,808	92,634	11,128	46
Long Valley	U. S. 395	237,271	233,108	3,534	629
Myers	U. S. 50	1,387,743	1,384,467	1,791	1,485
Topaz[a]	U. S. 395	117,122	116,230	561	331
Truckee	Interstate 80	2,055,153	1,995,101	52,931	7,119
Woodfords[b]	State 88	11,755	11,508	244	1
Blythe	Interstate 10	1,074,683	929,480	134,878	9,664
Needles	Interstate 40	636,257	568,598	65,477	4,282
Searchlight Junction[a]	U. S. 95	29,014	25,460	3,246	310
Vidal	Parker-Desert Center	290,909	282,186	8,421	302
Winterhaven	Interstate 8	937,467	822,570	110,231	4,436
Yuma	Interstate 15	1,590,991	1,514,387	66,671	9,933

[a]Closed November 1, 1968 (now operated on a spot-check basis).
[b]Closed September 1, 1968 (now operated on a spot-check basis).

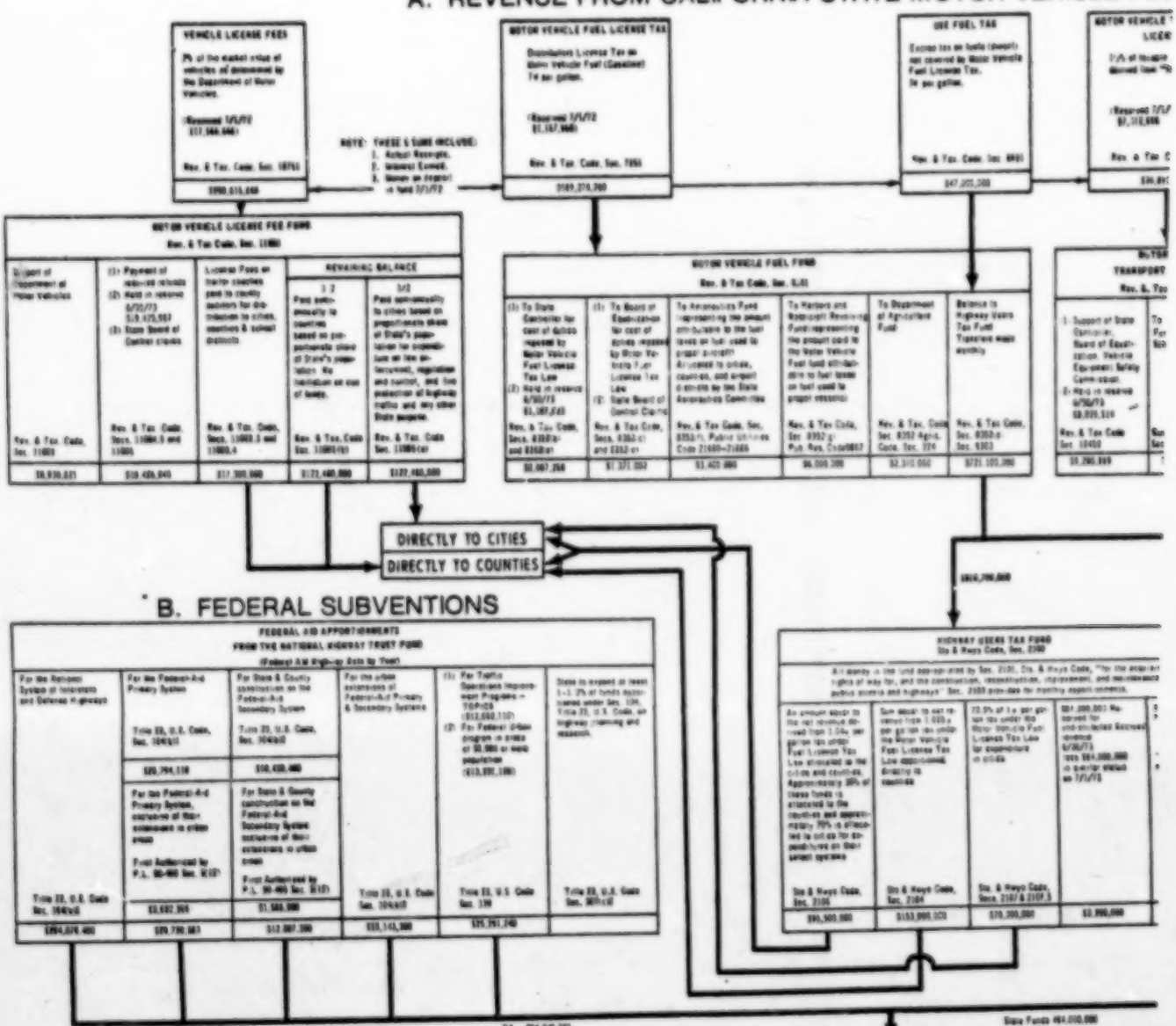
Department of Agriculture
Bureau of Plant Quarantine

Source: California Statistical Abstract - 1970

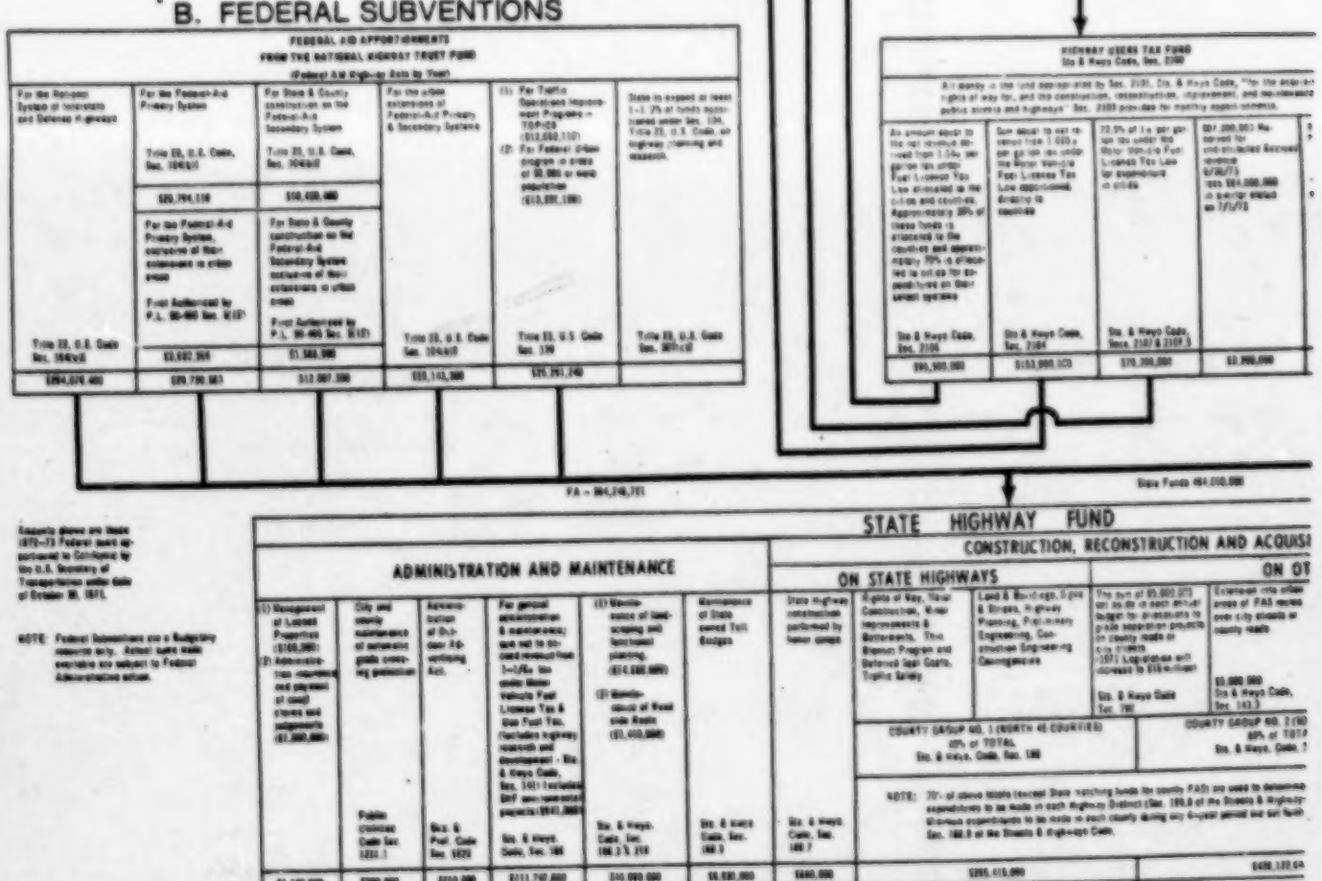
Appendix

BUDGETARY FLOW OF STATE MOTOR VEHICLE FEES AND HIGHWAY USERS TAXES IN CALIFORNIA FOR THE 1972-73 F

A. REVENUE FROM CALIFORNIA STATE MOTOR VEHICLE FEE

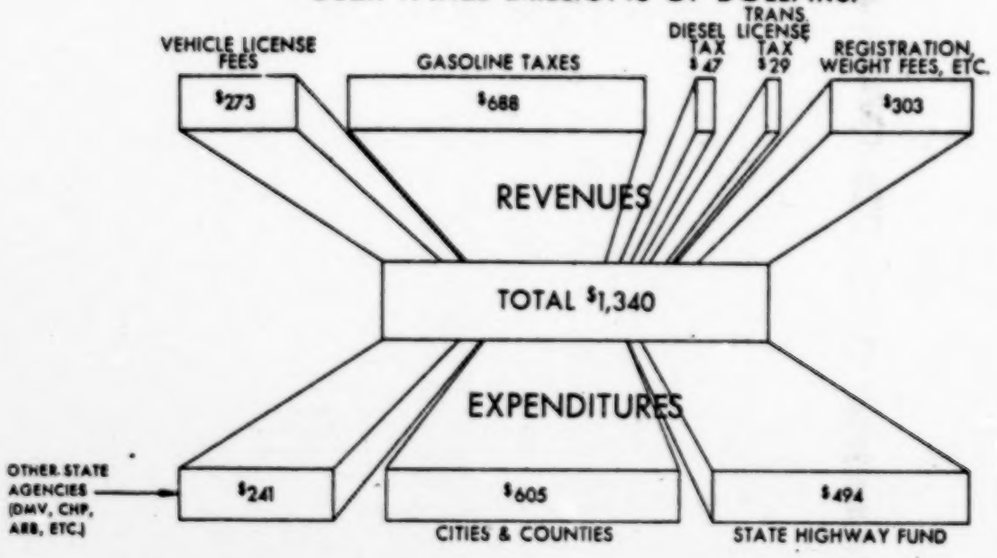


B. FEDERAL SUBVENTIONS

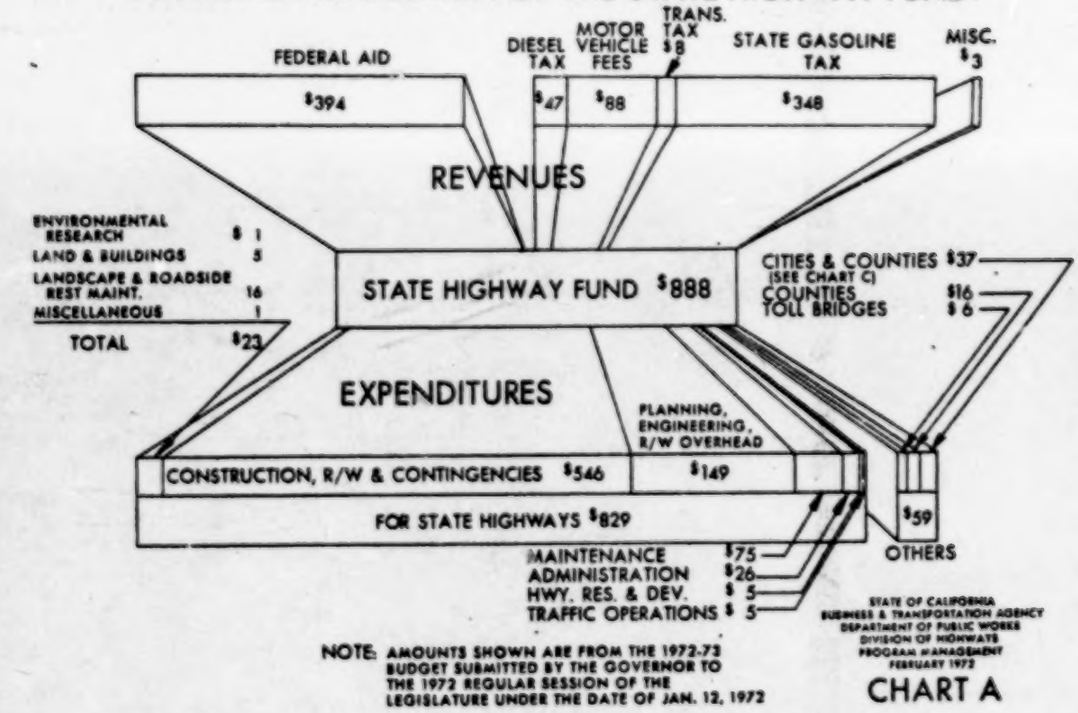


Source: California Division of Highways Publication entitled "California Highway Financing" Rev. May-1972

SOURCE & DISTRIBUTION OF CALIFORNIA STATE MOTOR VEHICLE & USER TAXES (MILLIONS OF DOLLARS)



SOURCE & DISTRIBUTION OF THE STATE HIGHWAY FUND



NOTE: AMOUNTS SHOWN ARE FROM THE 1972-73 BUDGET SUBMITTED BY THE GOVERNOR TO THE 1972 REGULAR SESSION OF THE LEGISLATURE UNDER THE DATE OF JAN. 12, 1972

STATE OF CALIFORNIA
BUSINESS & TRANSPORTATION AGENCY
DEPARTMENT OF PUBLIC WORKS
DIVISION OF HIGHWAYS
PROGRAM MANAGEMENT
FEBRUARY 1972

CHART A

Source: California Division of Highways Publication entitled: "California Highway Financing" Rev. May 1972

INTERSTATE COMMERCE EVIDENCE BASED UPON PLAINTIFFS' SWORN STATEMENTS IN PLAINIFFS' ANSWERS TO INTERROGATORIES AND PLAINTIFFS' AFFIDAVITS

1. That each of the defendants is engaged in the business of constructing and supplying materials for the construction of Federal roads and highways planned and controlled by the Federal Government, and likewise financed by the Federal Government under the Streets and Highways Code Annotated, Title 23, Sections 104, et seq. (8 P. 1720)

2. That a substantial portion of the crude oil, which is refined for the purposes of producing the various petroleum products, including liquid asphalt, is brought into the State of California from foreign countries. (8 R 1720)

3. That each of the defendants does business across state lines and does sell and transport across state lines specific asphaltic products which are the subject of competition involving plaintiff Copp (8 R 1721)

4. That there is a multi-state conspiracy, as alleged, and an agreement to divide up the markets between the various competitors on a geographic basis in order to avoid competition, and that this agreement and geographical division has and is presumed to have a direct and substantial affect on interstate trade and commerce. (8 R 1721)

5. That the areas encompassed by defendants attempt to monopolize, conspiracy to monopolize and monopolization were in the states of California, Oregon, Washington, Arizona, Nevada and New Mexico. (8 R 1722)

6. That the business of paving Federal and interstate highways is "in commerce". (8 R 1722)

7. That with respect to the oil refiners, who also refine liquid asphalt in this case, a substantial portion of their crude petroleum comes from across state lines, a substantial portion of the liquid

asphalt products are shipped across state lines, and a vast preponderance of liquid asphalt produced by the refiners is ultimately applied on interstate federal roads and highways which are "in commerce". (8 R 1723-1724)

8. That with respect to contractors and dealers in liquid asphalt in this case, such contractors and dealers do business across state lines, ship their products across state lines, and a substantial portion of their work, which is constructing highways, is performed on interstate and federal highways which are, by definition, "in commerce". (8 R 1724)

9. That approximately 85% of the liquid asphalt business within Los Angeles County is controlled by Industrial Asphalt and Sully-Miller. (8 R 1724).

10, That Sully-Miller and Industrial each does business across state lines, and a substantial portion of their business is in the construction and maintenance of interstate and federal highways which is "in commerce". (8 R 1725).

11. That Industrial and Sully-Miller are producers of asphaltic concrete, which is produced for the specific purpose of applying same to interstate and federal highways, and a substantial portion of the business of each defendant is in the construction of interstate and federal highways. (8 R 1726)

12. That Industrial maintains and owns plants in Arizona and Nevada and regularly ships its products across state lines to Arizona and Nevada. (8 R 1728)

13. That a substantial portion of the work performed by Industrial is on interstate and federal roads. (8 R 1729)

14. That Sully-Miller does business across state lines, including, but not limited, to transactions in Utah and Thailand. (8 R 1729)

15-16. That Sully-Miller's business is that of a contractor whose major business is that of paving and constructing interstate highways and that a substantial portion of their work is on federal interstate highways. (8 R 1729).

17. Beginning at a date unknown to plaintiffs and continuing at least to the date of the filing of this complaint, defendants, and each of them together with the co-conspirators, have engaged in a continuous agreement, combination, conspiracy and concert of action in the State of California, including the County of Los Angeles, and in other western states of the United States, in unreasonable restraint of commerce and trade, in the sale of hot asphalt oil, asphaltic concrete, and in the business of grading and paving of roads and highways and the defendants, and each of them, have purposely and with deliberate and specific intent, attempted to monopolize, conspired with each other and the co-conspirators, to monopolize and did monopolize, the aforesaid trade and commerce, all in violation of Sections 1 and 2 of the Sherman Act.

18. One of the purposes and objectives of the aforesaid combination and conspiracy to restrain and the combination and conspiracy to monopolize, attempt to monopolize and monopolization has been the destruction and elimination of plaintiffs as a viable entity so that:

(a) Plaintiffs would be eliminated as a competitor of Industrial and Sully-Miller;

(b) Plaintiffs would be penalized for remaining as an independent competitor in the manufacture and sale of asphaltic concrete, and in the business of grading and paving highways and roads.

19. In furtherance of the above-described violation of said antitrust laws, the defendants, and each of them, together with the co-conspirators, agreed to and in fact engaged, among other things, in the following acts and practices:

(a) Fixed, stabilized and maintained the prices at which hot asphalt oil would be sold to end users, including governmental agencies and to hot plant owners, including plaintiffs;

(b) Allocated and exchanged between each other supplies of crude petroleum and petroleum products, including, but not limited to supplies of hot asphalt;

(c) Fixed, stabilized and maintained the prices at which asphaltic concrete would be sold to end users, including governmental agencies, and to contractors;

(d) Eliminated competition and obtained and exercised monopoly power in the operation of hot plants and in the sale of asphaltic concrete by acquiring ownership and control of a substantial number of hot plants, including more than sixty per cent (60%) of all the hot asphalt plants operated in Southern California and in Los Angeles and Orange Counties;

(e) Allocated and divided, on a geographic basis and upon a customer basis, the outlets to whom hot asphalt oil and asphaltic concrete would be sold;

(f) Sold asphaltic concrete at unreasonably low prices in the areas in which they competed with plaintiffs and subsidized said unreasonably low prices by artificially maintaining prices in other areas in which plaintiffs did not compete;

(g) Sold and installed asphaltic concrete at or below cost in areas where plaintiffs competed with defendants and subsidized said sales by artificially maintaining higher prices in areas where plaintiffs did not compete;

(h) Threatened actual and potential customers of plaintiffs that unless they refrained from purchasing asphaltic concrete from plaintiffs in plaintiffs' area of competition, that said customers would be unable to obtain supplies of asphaltic concrete at a competitive price in other areas where said customers had no other source of supply other than defendants;

(i) Extended unreasonably advantageous credit terms to customers in order to preclude said customers from purchas-

ing asphaltic concrete from any other suppliers, including plaintiffs;

(j) Required customers who were indebted to defendants to purchase all of their asphaltic concrete from said defendants upon threat of immediately enforcing the collection of outstanding debt, thereby precluding said customers from purchasing asphaltic concrete from other suppliers, including plaintiffs;

(k) Tied the sale of other commodities, including base rock material, and tied the availability of credit to the sale of asphaltic concrete so as to induce and require purchasers of asphaltic concrete to purchase their supply thereof from Sully-Miller and not to purchase their supply from third parties, including plaintiffs;

(l) Sold hot asphalt oil and asphaltic concrete in such a manner as to discriminate in price between purchasers of such commodities of like grade and quality where the effect of such discrimination was to substantially lessen competition and tended to create a monopoly;

(m) Gulf acquired all of the capital stock of Industrial, as hereinabove alleged, and the effect thereof may be substantially to lessen competition and to tend to create a monopoly, in violation of Section 7 of the Act of Congress of October 15, 1914, commonly known as the Clayton Act, 15 U.S.C., Section 18, as amended; and

(n) Union acquired all of the capital stock of Sully-Miller, as hereinabove alleged, and the effect of that acquisition may be substantially to lessen competition, and to tend to create a monopoly, in violation of Section 7 of the Act of Congress of October 15, 1914, commonly known as the Clayton Act, 15 U.S.C., Section 18, as amended." (Paragraphs 17 through 19(n)—8 R 1716—1720)

INTERSTATE COMMERCE EVIDENCE BASED UPON DEFENDANTS' ADMISSIONS

1. All defendants, except Edgington Oil Company, expressly admitted the following facts pertaining to the relationship between the Federal Government and the interstate and Federal system highways in the State of California:

(a) The Federal Government contributes a portion of the cost of construction of public highways; that the basis of Federal participation is the Federal Aid Highway Act (23 USC Section 101 through 14); that under that Act, the Federal Government assumes about 90% of the highway construction costs; that to qualify for such aid, state standards are required as to vehicle weight and width limitations (23 USC Section 127), control of outdoor advertising (23 USC Section 135), creation of highway safety program (23 USC Section 135), control over junk yards (23 USC Section 136); that each project is subject to the inspection and approval of the Safety of Transportation and was formerly under the control of the Secretary of Commerce; that all wages paid for laborers and mechanics employed by contractors or subcontractors own roads funded by the Federal Act are controlled by the David-Bacon Act (23 USC Section 113); that small business enterprises are to be assisted in obtaining contracts under the Federal Aid Highway Act in order to encourage full and free competition under 23 USC Section 304; that to obtain State Aid a satisfactory Highway Department must be established (23 USC Section 101); that the State of California has qualified and receives funds and consents specifically to the provisions of Title 23; that the State of California has apportioned 98.5% of the monies received by it under the 1950 Act for the improvement of county highways; that defendant Sully-Miller and defendant Industrial must comply with Executive Order No. 11246

dated September 24, 1965, in order to perform work on county roads funded under the Federal Highway Aid Act. (8 R 1763-1768; 1800-1805; 1875-1878; 1907-1912)

GULF OIL CORPORATION

2. Gulf refines crude oil at its Santa Fe Springs Refinery. From 1965 to 1970 the crude oil refined at this refinery ranged from a total of 16 million to 17.5 million barrels per year. During said period the crude oil refined at this refinery included foreign crude ranging from 4.3 million barrels to 7.6 million barrels per year and Utah crude ranging from 980,000 to 4.2 million barrels per year.

3. The asphalt yield from all of the crude oil refined during this same period ranged from 1 million barrels to 1.3 million barrels per year (8 R 1755).

4. Gulf sold all of its liquid asphalt to its subsidiary Industrial Asphalt (8 R 1572).

INDUSTRIAL ASPHALT COMPANY

5. Industrial admits that it purchases liquid asphalt produced from imported and domestic crude petroleum which it used in the manufacture of asphaltic concrete (1 R 48).

6. Industrial owned 55 hot plants, including a plant in Las Vegas—Henderson, Nevada and a plant in Phoenix, Arizona (8 R 1866).

7. Industrial made sales of liquid asphalt, among other places, in Arizona, California, Nevada and Utah. A schedule showing Industrial's customers is contained at 8 R 1859-1862. Industrial purchased liquid asphalt from 1964 through 1969 from approximately 12 additional suppliers, including the Arizona Refining Co. (8 R 1963-1965).

8. From 1964 to 1970 Industrial's California plants total asphaltic concrete sales ranged from 3.9 million tons to 5.2 million tons, its asphaltic concrete sales from its Phoenix plant ranged from 5,000 tons to 277,000 tons, and its asphaltic concrete sales from its plant in Las Vegas—Henderson, Nevada were 21,000 tons in 1969 and 91,000 tons in 1970 (8 R 1856).

UNION OIL COMPANY

9. During the period 1966 to 1970 Union, at its California refineries, refined between 64 million and 70 million barrels of crude oil per year. The out-of-state source of this crude (including other states and foreign sources) ranged from 2.4 million barrels per year to 15 million barrels per year (8 R 1787).

10. During the same period, Union's production of tons of liquid asphalt from its three refineries in Los Angeles, Santa Maria and San Francisco was: Los Angeles—163,000 tons to 225,000 tons per year; Santa Maria—34,000 tons to 42,000 tons per year; San Francisco—116,000 tons to 16,000 tons per year.

11. Union admits that Union ships liquid asphalt to customers located in other states of the United States (1 R 57). Union further admits that Union sells liquid asphalt to end users and contractors and that such liquid asphalt, as hot asphalt oil, or in some other cases as a constitutent of asphaltic concrete, is used for constructing, maintaining, surfacing, re-surfacing and repairing of roads and highways, including federal interstate system highways and highways directly connected to interstate highways (1 R 57).

SULLY-MILLER CONTRACTING CO.

12. Sully-Miller admits that liquid asphalt is obtained from refining crude petroleum in some cases domestic and in other cases foreign (1 R 64). That such liquid asphalt, in some cases, is used directly and in other cases is used as one of the constituents of asphaltic concrete for constructing, maintaining, surfacing, re-surfacing and repairing roads and highways, including federal interstate system highways and highways directly connected to interstate highways (1 R 65).

13. Sully-Miller owns 11 hot plants generally in Southern California (8 R 1897-1898).

14. Sully-Miller admits that Edgington sells hot asphalt oil to customers outside of California (8 R 1914).

EDGINGTON OIL COMPANY

15. From 1964 to 1969 Edgington processed crude oil ranging from 2.4 million barrels to 3.2 million barrels per year (8 R 1821).

16. During the years 1964 through 1969 Edgington produced asphalt ranging from 1 million barrels to 1.4 million barrels per year (8 R 1823-1824).

17. Edgington's shipments of liquid asphalt to Nevada was 69 tons in 1964; 1436 tons in 1965; and 134 tons in 1966 (8 R 1826).

The opinion of the United States Court of Appeals for the Ninth Circuit, filed October 3, 1973, in In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, Copp Paving Company, Inc., et al., Appellants, v. Gulf Oil Company, et al., Appellees, No. 72-2152 therein, is printed as Appendix B to the Petition for Writ of Certiorari in this cause, and is incorporated herein by reference.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., AND EDGINGTON OIL COMPANY,

Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., AND ERNEST A. COPP,

Respondents.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The citations to the opinions below are adequately set forth in the Petition (Pet. 2). The Opinion of the District Court is attached to the Petition as Appendix A, pages 1 through 8, and the Opinion of the Court of Appeals is attached to the Petition as Appendix B, pages 9 through 15.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2).

Statement of the Case.

A. Basic Facts.[1]

The Respondents are Copp Paving Company, Inc., Copp Equipment Company, Inc., and Ernest A. Copp (hereinafter "Copp"). Copp operates a hot plant where it manufactures asphaltic concrete from hot liquid asphalt, aggregates and fillers. Copp sold asphaltic concrete to third parties (so-called "commercial sales") and also employed asphaltic concrete to construct, maintain and repair interstate highways.[2]

Petitioners, Gulf Oil Company ("Gulf"), Union Oil Company of California ("Union") and Edgington Oil Company ("Edgington") (hereinafter sometimes referred to as "the oil companies") purchased crude petroleum from foreign, interstate and local sources and operated refineries from which, among other things, liquid asphalt was produced.

(a) Gulf sold all of its liquid asphalt to Petitioner, Industrial Asphalt, Inc. ("Industrial"), Gulf's subsidiary, for further distribution in the form of liquid asphalt or for conversion by Industrial into asphaltic concrete (8 R 1572).

(b) Union sold its liquid asphalt to third parties in the western states, and it also supplied some of the liquid asphalt requirements of Sully-Miller Contracting Co. ("Sully-Miller"), Union's subsidiary, for conversion into asphaltic concrete (1 R 57).

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[1]The facts are taken from the record which was before the Court of Appeals and are cited as .... R ..... Reference to the opinions of the trial court are shown as "Pet. App. A ...." and "Pet. App. B ....".

[2]Interstate highways are part of the federal system highways described in 23 U.S.C.A., Sections 101 *et seq.*

(c) Edgington sold its liquid asphalt in California and Nevada. In Southern California it sold to Copp, Industrial and Sully-Miller among others (8 R 1826, 1914).

Petitioner, Industrial, purchased all of Gulf's supply of liquid asphalt, and together with supplies of liquid asphalt acquired from other suppliers, both inside and outside of California, distributed that liquid asphalt, in part, in a number of western states including California. Industrial also owned and operated fifty-five (55) hot plants in California, Arizona and Nevada where it manufactured and sold asphaltic concrete to third parties in competition with Copp and others, and also employed asphaltic concrete in the construction, maintenance and repair of interstate highways, in competition with Copp and others. Gulf acquired all of the capital stock of Industrial (1 R 48; 8 R 1856, 1866, 1963-1965).

Sully-Miller, a wholly-owned subsidiary of Union, purchased liquid asphalt from Union and from others, with the balance of Union's supply of liquid asphalt being distributed in the western states. Sully-Miller operated eleven (11) hot plants in Southern California, manufactured asphaltic concrete and either sold or used that asphaltic concrete for constructing, maintaining and repairing interstate highways. Union acquired all of the capital stock of Sully-Miller.[2a] (1 R 65; 8 R 1897-1898).

Both liquid asphalt and asphaltic concrete are used in connection with the construction, maintenance, surfacing, resurfacing, repairing, grading and paving of in-

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[2a]Sully-Miller is not a petitioner here although this court's disposition of the case will directly affect it.

terstate roads and highways. It was always conceded below that the liquid asphalt market was an interstate market. However, petitioners contended that because asphaltic concrete, by its very nature, cannot be transported long distances for application to roads and highways, that fact conclusively established the asphaltic concrete market as a local market not subject to any of the antitrust laws of the United States (See Pet. pp. 6-7).

B. Proceedings in the District Court.

Copp's complaint in the District Court alleged, in essence, that the petitioners, and others, entered into a combination and conspiracy to restrain and monopolize the sale of liquid asphalt, the sale of asphaltic concrete, and the business of asphaltic paving of highways and roads, including particularly interstate and federal system highways, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. 112), and that pursuant thereto, petitioners (and Sully-Miller) had obtained control of seventy-five percent (75%) of this paving business in Southern California. Copp alleged, under oath, (8 R 1716-1720) that the elements of this combination and conspiracy included, among other things, the following:

(a) The fixing of prices at which hot asphalt oil would be sold;

(b) The allocation of supplies of petroleum and petroleum products, including hot asphalt;

(c) The fixing of prices for the sale of asphaltic concrete;

(d) The acquiring of ownership and control of a substantial number of hot plants, including

more than sixty percent (60%) of all of the hot plants operated in Southern California and in Los Angeles and Orange Counties;

(e) The allocation of customers as respects hot asphalt oil and asphaltic concrete;

(f) Threatening Copp's customers to cut off supply of asphaltic concrete in areas where Copp did not operate;

(g) Buying off and coercing Copp's customers not to do business with Copp;

(h) Tying the sale of other commodities so as to induce and require asphaltic concrete purchasers not to purchase from Copp in violation of Section 3 of the Clayton Act, 15 U.S.C. Section 14;

(i) Selling hot asphalt oil and asphaltic concrete in such a manner as to discriminate in price between purchasers of such commodities of like grade and quality in violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. Section 13;

(j) Selling asphaltic concrete at unreasonably low prices and at below cost in the area where Copp competed and subsidizing those unreasonably low prices by artificially maintaining prices in other areas in which Copp did not compete;

(k) That Gulf acquired all of the capital stock of Industrial in violation of Section 7 of the Clayton Act, 15 U.S.C., Section 18;

(l) That Union acquired all of the capital stock of Sully-Miller in violation of Section 7 of the Clayton Act, 15 U.S.C., Section 18.

Copp's action was transferred to the District Court for the Northern District of California and became part of the Western Liquid Asphalt cases which had been consolidated by the Panel on Multidistrict Proceedings. These Western Liquid Asphalt Cases were actions brought by a number of western states, and others, against Gulf, Union, Edgington and Industrial, and others, alleging a price fixing conspiracy in the western states with respect to liquid asphalt only (*In re* Coordinated Pretrial Proceedings in Western Liquid Asphalt cases, *State of Alaska v. Standard Oil of California, et al.*, Trade Cases Par. 74,733 (9th Cir. 1973).

The trial court invited separate consideration of the asphaltic concrete elements of Copp's complaint. It was stipulated that all of the substantive allegations of Copp's complaint were to be admitted for the purpose of any motion for partial summary judgment addressed to the interstate commerce issue (13 R 306). When Copp commenced discovery on the issue of the interrelationship between the conspiracy which it had alleged and the asphaltic concrete interstate commerce issue, petitioners telescoped such discovery with a stipulation "that more than a de minimis quantity of the asphaltic concrete delivered by Copp and their competitors is delivered for use on interstate highways" (Pet. App. A p. 3).

Two basic arguments were made by Copp in the District Court. The first was:

(a) That the admitted facts of the liquid asphalt-asphaltic concrete conspiracy wherein, among other things, liquid asphalt prices to Copp and others were kept high and asphaltic concrete prices in competition with Copp were held low, creating the kind of "squeeze"

condemned in *United States v. Aluminum Corporation of America, Inc.*, 148 F.2d 416 (2nd Cir. 1945) established, *per se*, both the violation of the antitrust laws and the *potential* impact on interstate commerce for jurisdictional purposes. High liquid asphalt prices, admittedly part of an interstate market, were the upper "jaw" and low asphaltic concrete prices were the lower "jaw" of the nutcracker, inevitably intertwined and clearly violative of the antitrust laws. The District Court, although precluded by Rule 56 of the Federal Rules of Civil Procedure from rejecting, on the merits, the inferences to be drawn from the admitted facts (*Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir. 1972) flatly ignored the proof.[a] Moreover, having considered that the affidavits established seventy-five percent (75%) control of the paving business in Southern California, which would obviously give the petitioners the power to exclude competition and increase prices as they pleased, the District Court was bound to

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[a] "Plaintiff Ernest Copp's affidavit is to the effect that Sully-Miller Contracting Company (Sully-Miller), a subsidiary of Union Oil Company of California (Union), and Industrial Asphalt, Inc., a subsidiary of Gulf Oil Corporation, together control 75% of the paving business in Southern California. It is claimed, and for the purposes of this order, it is assumed, that Sully-Miller and Industrial Asphalt, Inc., are given preferential prices for liquid asphalt by their parent corporations which produce asphalt and that it is as a result of this competitive advantage that they have injured plaintiffs and gained for themselves a substantial corner on the paving market in Southern California.

Defendants' dealings in asphaltic concrete bear two possible relationships to restraints of interstate commerce. It is conceivable that a monopoly with respect to a product used in interstate highways could so increase the price of the product and the subsequent cost of the highways that fewer and poorer highways would be constructed and the interstate commerce could thus be affected. There is no evidence which gives any substance to this possibility. *Cf. Uniform Oil Co. v. Phillips Petroleum Co.*, 400 F.2d 267 (9th Cir. 1968) (Pet. App. A, p. 6).

recognize the potential impact of that monopoly power on the cost of constructing, repairing and maintaining interstate highways. That power to increase the cost of materials going into interstate highways, unlawfully obtained and utilized, should have been enough, standing alone, to settle the interstate commerce jurisdiction issue (*Rasmussen v. American Dairy Association, supra*).

Moreover, a fourteen million dollar ($14,000,000.00) price increase was expressly established and this quantification of a price increase was ignored. (9 R 2047). No quantification was required at all since "in commerce" activities as respects the federal interstate highway system were established. *United States v. Bensinger,* 430 F.2d 584 (8th Cir. 1970).

(b) Copp argued that since the combination and conspiracy to restrain and monopolize the asphaltic paving of highways and roads, including particularly interstate and federal system highways, was conceded for the purpose of the motion, and since interstate highways and roads are instrumentalities of interstate commerce, *that* showing, as a matter of law, established that the condemned activities were "in commerce" and satisfied the jurisdictional requirements of Sections 1 and 2 of the Sherman Act, Sections 7 and 3 of the Clayton Act and Section 2(a) of the Robinson-Patman Act. The District Court rejected this contention and granted partial summary judgment as to all issues relating to the asphaltic concrete market (Pet. App. A, pp. 7-8).

C. Proceedings in the Court Below.

Copp was allowed an interlocutory appeal to the Court of Appeals under 28 U.S.C., Section 1292(b). That Court reversed the order of partial summary judgment (Pet. App. B, p. 15) solely upon the ground that the asphaltic concrete aspect of the combination and conspiracy alleged, since it was tied directly to interstate roads and highways, clearly involved a potential impact "in interstate commerce".

With respect to the Sherman Act, the Court noted that it had been long established in this Court's decisions that Congress in passing the Sherman Act desired to exercise the full extent of its Constitutional power in restraining trust and monopoly agreements. *United States v. Southeastern Underwriters Association,* 322 U.S. 533, 558, 559 (1944), and that, as this Court's reading of this commerce clause has expanded over time, so has its interpretation of the jurisdictional scope of the Sherman Act. See cases collected in *Mandeveille Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 230, 231 (1948). The Court observed that, subject to exceptions not applicable here, each holding that conduct is within the reach of Congress' Constitutional power for some other purpose was entitled to great weight in a Sherman Act case. It further noted that the decisions in *Overstreet v. North Shore Corp.,* 318 U.S. 125 (1943); *Allstate Construction v. Durkin,* 345 U.S. 13 (1953) and *Mitchell v. S. W. Vollmer & Co.,* 349 U.S. 427, 429 (1955) had established that for purposes of the Fair Labor Stand-

ards Act, 29 U.S.C., Sections 201 *et seq.*, vehicular roads were instrumentalities of interstate commerce, that persons repairing them were "engaged in commerce", that those engaged in the local production of a road surfacing mixture for local use in an interstate highway were covered, and that the test was "whether the work is so directly and vitally related to the functioning of an instrumentality of interstate commerce as to be, in practical effect, a part of its rather than isolated local activity." Adhering to the application of those principles in *City of Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 821 (5th Cir.), cert. den. 379 U.S. 900 (1964), the Court below held that if highway builders and suppliers are "in commerce" because of their close relationship with an instrumentality of interstate commerce for labor relations purposes, they are in commerce for the regulation of price fixing and monopolization particularly where the allegation and proof is as to activities involving the illegal manipulation of the very costs and products which put those same businesses "in" interstate commerce for purposes of the Fair Labor Standards Act.

Finally, the Court held "that the reach of Congress' power for Sherman Act purposes is no shorter than it is for any other purposes" (Pet. App. B, p. 13).

With respect to the paragraph in Copp's allegations relating to Union's illegal acquisition of all of the capital stock of Sully-Miller, in violation of Section 7 of the Clayton Act, 15 U.S.C., Section 18, it should be noted that Section 7 prohibits the acquisition by a corporation "engaged in commerce" of all or any part of the capital stock of any other corporation engaged also "in commerce" *where in any line of commerce in any section*

of the country the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly. . . ." (emphasis supplied). The Court below noted that the portion of Section 7 of the Clayton Act, italicized above, was in no way involved in the proceedings at the trial court level or the Court of Appeals. That issue is substantive not jurisdictional. The Court said "it is not necessary for a plaintiff to prove his whole case in order to give the courts jurisdiction to hear it." (Pet. App. B, p. 15).[4] Since Union was, without dispute, engaged in commerce (importing and refining petroleum and selling liquid asphalt) and Sully-Miller was engaged "in commerce" by manufacturing and using asphaltic concrete in the construction and repair of interstate roads and highways, jurisdiction as respects this claim was clearly established.

As respects Copp's allegation of the violation of Section 3 of the Clayton Act (15 U.S.C., Section 14), that statute prohibited, in substance, any person "engaged in commerce, in the course of such commerce . . ." to sell goods on the condition that the purchaser would not deal in the goods of a competitor. Since Industrial is "engaged in commerce" (purchasing liquid asphalt and selling it in the western states, manufacturing asphaltic concrete for sale to third parties and using asphaltic concrete in the construction and maintenance of interstate roads and highways) and since the tie-in sales of asphaltic concrete were in the course of "such

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[4]It is equally true of course that the "effect" provisions of Section 3 of the Clayton Act, 15 U.S.C., Section 14 and Section 2(a) of the Robinson-Patman Act (15 U.S.C., Section 13(a)) were not and are not in issue as respects the question of jurisdiction.

commerce", a clear showing of the interstate commerce jurisdictional requirements of that Act was established.

In the allegations of Copp's complaint as respects violation of the Robinson-Patman Act, it was alleged that Industrial and Sully-Miller sold asphaltic concrete at unreasonably low prices, and at or below cost, in the areas in which they competed with Copp and subsidized said prices by artificially maintaining prices in other areas in which Copp did not compete, and that these parties discriminated in price in the sale of asphaltic concrete between purchasers of such commodities of like grade and quality (8 R 1716-1720). In substance, the Robinson-Patman Act prohibits any person "engaged in commerce in the course of such commerce . . . to discriminate in price . . . where either or any of the purchases involved in such discrimination are in commerce. . . ." The Court of Appeals held that the sale of asphaltic concrete by Industrial for use in the construction, maintenance and repair of interstate roads and highways was a sale "in commerce" within the meaning of the Robinson-Patman Act. The Court's rationale was simple. It said "We see no reason why sales which are 'in commerce' because of their nexus with an instrumentality of interstate commerce must also satisfy a state line test of 'in commerce' ". It noted that the fact that Section 7 of the Clayton Act, Section 3 of the Clayton Act and Section 2(a) of the Robinson-Patman Act were intended to supplement the purpose and effect of the Sherman Act, supports a uniform interpretation of the "in commerce" requirement present in all three Acts (Pet. App. B. p. 14).

ARGUMENT.

Petitioners Have Not Demonstrated Any Conflict Between the Decision Below and the Decision of Any Other Court as Respects the Sherman Act Issues, and the Decision Below Is Clearly in Accord With the Applicable Decisions by This Court.

Petitioners assert that the decision below is in conflict with the following cases:

Fifth Circuit:

Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co., 469 F.2d 416 (1972);

Littlejohn v. Shell Oil Company, 483 F.2d 1140 (1973, *en banc*);

Sixth Circuit:

Willard Dairy Co. v. National Dairy Prods. Co., 309 F.2d 943 (1962), cert. den. 373 U.S. 934 (1963);

Seventh Circuit:

Mayer Paving and Asphalt Co. v. General Dynamics Corp., ... F.2d ...., 1973-2 Trade Cases Par. 74,719 (Oct. 1, 1973);

Borden Co. v. Federal Trade Commission, 339 F.2d 953 (1964);

Tenth Circuit:

Belliston v. Texaco, Inc., 455 F.2d 175 (10 Cir.), cert. den. 408 U.S. 928 (1972).

Littlejohn v. Shell Oil Company, Willard Dairy Co. v. National Dairy Products Co., Mayer Paving and Asphalt Co. v. General Dynamics Corp. and *Borden Co. v. Federal Trade Commission, supra,* are not

Sherman Act cases at all. Each involves alleged violations of the Robinson-Patman Act only. In *Belliston v. Texaco, Inc., supra,* the discussion of the Sherman Act issue does not contain a single word relating to interstate commerce. Thus, five out of the six allegedly conflicting cases have no relevance whatsoever to the Sherman Act commerce issue.

In *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.,* 469 F.2d 416 (1972), a sand and gravel company, Rosemound, operating in Louisiana, asserted that two Louisiana companies combined to interfere with the sand and gravel output requirements agreement which Rosemound had arranged with a large construction company. The issue before the Court of Appeals was whether the trial court properly granted a motion to dismiss under 12(b)(1) of the Federal Rules of Civil Procedure. The court noted that "the complaint contains only the barest conclusory statement of jurisdiction. . . ." Thus, fundamentally, the *Rosemound* decision was a pleading case in which the plaintiff failed to plead the essential allegations necessary to show jurisdiction.[5]

Inherent in petitioners' argument as to the Sherman Act issue is simply a flat rejection of the holding by

[5]Petitioners' reliance on Footnote 1 of this pleading decision by the Court of Appeals is clearly misplaced. In the Trial Court Opinion, 30 Fed. Supp. 549, that court held that the sand and gravel which were to be "manufactured into mattresses" and used on the banks of the Mississippi River was solely for the purpose of protecting Louisiana land from eroding (330 Fed. Supp. 549, 554). The footnote reference in the decision by the Court of Appeals which makes reference to an alleged claim that this so-called "mattress" was floated down the Mississippi and placed on its bed is directly contrary to the finding of fact by the trial court. Moreover, since the decision affirmed an order on a motion to dismiss, the factual references by the Court of Appeals are clearly dicta.

this Court in *United States v. Southeastern Underwriters Association,* 322 U.S. 533, 558, 559 (1944) that in adopting the Sherman Act Congress desired to exercise the full extent of its Constitutional power in restraining trust and monopoly agreements. It needs no erudition to show that the words restraint of "trade or commerce among the several states or with foreign nations" contained in Sections 1 and 2 of the Sherman Act are lifted bodily from Article I, Section 8 of the Constitution. This Court's decisions mean that this fact was no accident.

Petitioners never make the argument that Congress does not have the power to protect the construction, maintenance and repair of the federal system of interstate highways from price fixing and monopolization. That argument, if it were made, would have failed in the days of *Gibbons v. Ogden* (9 Wheat. 1, 6 L.Ed. 23 (1824)), and it must fail now.

Moreover, the decision of the Court below can be sustained on two alternative grounds not considered in the opinion.

1. The trial court acknowledged evidence in the record that the petitioners controlled seventy-five percent (75%) of the paving business in Southern California and had gained for themselves "a substantial corner on the paving market in Southern California". It further acknowledged that "it is conceivable that a monopoly with respect to a product used in interstate highways could so increase the price of the product and the subsequent cost of the highways that fewer and poorer highways would be constructed and that interstate commerce could thus be affected" (Pet. App. A, p. 6).

Although the trial court said "there was no evidence which gives substance to this possibility" this statement was a complete *non sequitur*. Monopoly power is defined as the power to exclude competition and to raise prices, and it was expressly alleged and admitted in this action. Certainly in these times no oil company would contend that combined monopoly power to raise prices cannot result in an unreasonable increase in prices. Since the only issue to be determined in a jurisdictional sense is the *potential* affect on interstate commerce (*Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir. 1972)), the proof conceded by the trial court was patently sufficient to establish jurisdiction.[6]

2. Secondly, the complaint alleged, and it was admitted for the purpose of the proceeding below, that the liquid asphalt suppliers fixed their prices high to Copp and kept those prices high so that Industrial and Sully-Miller, who obtained preferential prices from their parent oil companies, could eliminate competition at the asphalt paving level. This classic price squeeze resulting here from conspiracy between all the petitioners was condemned, even as to a single seller, is a violation of Section 2 of the Sherman Act in *United States v. Aluminum Company of America*, 148 F.2d 416, 438 (2nd Cir. 1945). Since a conceded interstate conspiracy as to liquid asphalt was combined with an asphaltic concrete conspiracy to eliminate competition and create a monopoly, the fact of the interstate liquid asphalt conspiracy, standing alone, was clearly sufficient to establish jurisdiction under the Sherman Act.

[6]The District Court had no power on a motion for partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure to make any finding of fact. The court's consideration and rejection of the evidence constituted, in effect, such a finding of fact. Monopoly with respect to asphaltic concrete surely could increase the price of the product and the cost of highways so that fewer and poorer highways could be constructed or interstate highways could suffer from reduced repair expenditures which would adversely affect interstate traffic in that manner. Since "potential affect", not actual effect, was the sole issue, the district court had no power to reject the showing.

Petitioners Have Cited No Case Which Conflicts With the Decision Below as to the Issue of Commerce as Applied to Section 7 of the Clayton Act or Section 3 of the Clayton Act.

Not one of the six decisions cited by petitioners on page 9 of the their brief creates any conflict whatsoever with the decision below as to the commerce requirements of Section 7 of the Clayton Act or Section 3 of the Clayton Act.

There is no reference, even by inference, to Section 7 of the Clayton Act in any of the opinions, and the facts in those opinions nowhere show any "acquisition" whatsoever.

In the *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.* case, *supra*, the court states: "As found by the trial court, this failure of any party to have any interstate business disposes of the Clayton Act . . . claims". No provision of the Clayton Act is cited. Moreover, as noted above, the opinion is a pleading decision, *i.e.*, it sustained an order to dismiss under Rule 12(b)(1). Thus, any discussion of "facts" is clearly dicta.

Union's acquisition of Sully, a company which operates eleven (11) hot plants and participated in the monopolization of the use of asphaltic concrete for constructing and maintaining interstate highways in Southern California is clearly an acquisition of a corpora-

tion "in commerce". See *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). Similarly, sales by Industrial (or Sully) of asphaltic concrete to those who maintain, construct and repair interstate highways on condition that they will not do business with Copp, a competing supplier of asphaltic concrete and interstate highway contractor, constitutes sales "in the course of such commerce" within the meaning of Section 3 of the Clayton Act. See *Standard Fashion Co. v. Magrane Huston Co.*, 258 U.S. 346 (1922).

Discriminatory Sales of Asphaltic Concrete for Use in Interstate Roads and Highways Are Sales "in Commerce" Within the Meaning of Section 2(a) of the Robinson-Patman Act—15 U.S.C., Section 13(a).

Petitioners make their most elaborate and vigorous attack upon the decision below as it applies to Copp's Robinson-Patman Act claims. It is not inaccurate to state that the Petition attempts to bootstrap its Robinson-Patman Act arguments into Sections 3 and 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act.

Although five of the decisions cited by petitioners at page 9 of their Petition hold that in the customary case at least one sale across state lines is required for jurisdictional purposes under the Robinson-Patman Act, none of these decisions demonstrate consideration of the issues tendered by the facts of the instant case. The showing made here is that the product involved and the sales thereof are "so directly and vitally related to the functioning of an instrumentality of interstate commerce

as to be, in practical effect, a part of it rather than isolated local activity" is not repeated in any case cited in the Petition.[7]

If the supplying of materials for the use in the construction and maintenance of interstate roads and highways is "in commerce" then there can be no dispute that Industrial was "engaged in commerce" when "in the course of such commerce" it made discriminatory sales. Petitioners assert that the only permissible test as respects sales "in commerce" is the crossing state lines test. That extreme position is patently without authority.

Petitioners' citation of *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941) does not enhance their argument. That decision related to an "affect on commerce" issue and has been overruled. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1947).

It should be noted that Copp's complaint alleges discriminatory sales in asphaltic concrete for use in interstate highways as an element of a combination and conspiracy in violation of Sections 1 and 2 of the Sherman Act. Patently, such discrimination, *i.e.*, selling in competition with Copp at prices lower than sales elsewhere, would have the effect, as intended, to eliminate

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[7]Neither the decision of the Court of Appeals in *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416, or the decision of the Trial Court at 330 Fed. Supp. 549 even hints at any facts showing discriminatory sales. In *Mayer Paving & Asphalt Co. v. General Dynamics Corp.* (1973), 2 Trade Cases, Par. 74,719 (7th Cir.), no facts are stated which show any connection with interstate roads and highways and none of the arguments or decisions relied upon by the Court below are considered. The mere allegation that Mayer Paving & Asphalt Co. is a "paving company" does not permit the conclusion that it is engaged in the business of using asphaltic concrete to construct, maintain and repair interstate highways.

Copp as a primary line competitor and to enhance the monopoly power of the petitioners in Southern California's interstate highway paving market. The direct and substantial federal interest in protecting instrumentalities of interstate commerce and the costs at which these instrumentalities are built and maintained fully justifies an interpretation of the Robinson-Patman Act to encompass sales in connection with that market. As the Court noted below, the fact that the Robinson-Patman Act, Section 7 of the Clayton Act and Section 3 of the Clayton Act were intended to supplement the intent and purpose of the Sherman Act supports a uniform interpretation of the "in commerce" requirement present in all three Acts.

Conclusion.

Petitioners' closing comment is that "the cause of federal antitrust enforcement is not forwarded by converting local squabbles into federal cases" (Pet. p. 23). We respond that the cause of federal antitrust enforcement is indeed compromised by fragmenting an interstate highway system into segments of cement and labelling the segments "local", and thereby seeking to reverse *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

We respectfully submit the Petition should be denied.

Dated at Los Angeles, California, this 14th day of February, 1974.

Respectfully submitted,

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Of Counsel.

Service of the writ and receipt of a copy thereof is hereby admitted this _____ day of February, A.D. 1974.

_____

_____

Supreme Court, U. S.
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In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,

Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,

Respondents.

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A petition should be determined upon the facts of the case presented, and the brief in opposition here possesses the capacity of deflecting attention from those facts.

1. The emphasis of that brief is upon "liquid asphalt." But the petition has nothing to do with "liquid asphalt"; it concerns "asphaltic concrete." Charges in the complaint of violations with respect to liquid asphalt were untouched by any order of the district court, were not involved in the proceedings before the Court of Appeals, and are not here. (See fn. 5, p. 7 of Petition). If respondents believe that there are facts about asphaltic concrete which enter into their case about liquid asphalt, the order of the district court left respondents free to assert them.

2. Respondents essentially admit that there is a conflict on the Robinson-Patman issue between the decision below and other circuits, particularly *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416 (5 Cir. 1972), and would distinguish that case as a "pleading case." (Br. 14). But, if that were true,[1] it would sharpen the conflict, for a pleading is construed strongly in favor of the pleader. Here there is a single Robinson-Patman issue—whether one making a commodity from materials obtained in the state of manufacture and selling it exclusively to others in that state is "in commerce" or whether its sales are "in commerce," merely because the buyer uses the commodity in making or repairing highways. *Rosemound* was precisely a case where "defendants sold sand and gravel [in Louisiana] to Louisiana contractors for the construction of highways." 469 F.2d at 419. Similar in holding no Robinson-Patman jurisdiction is *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, ... F.2d ....., 1973-2 Trade Cases ¶ 74,419 (7 Cir. 1973), where this Court denied certiorari (No. 73-671, January 14, 1974) despite the fact that petitioners there relied in their Supplemental and Reply Brief (at p. 3) on the very decision of the Ninth Circuit of which we here seek review. *Mayer Paving* and the decision below cannot both be correct. Certiorari having been denied in *Mayer Paving*, it should be granted here or the law will be left in confusion.[2]

3. *Rosemound* is also in direct conflict on the Sherman and Clayton Act issues. On the Sherman Act issue, respondents write about a "potential affect [sic]" on interstate commerce (e.g., at

1. Actually, in *Rosemound*, the court's opinion contains repeated reference to facts appearing in affidavits, interrogatory answers, and depositions, 469 F.2d at 417-18

2. Respondents' assertion (Br. 19) that *Federal Trade Commission v. Bunte Bros. Inc.*, 312 U.S. 349 (1941) was overruled in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1947) is demonstrated to be incorrect by reading the opinion in *Cement Institute* at pp. 695-6.

Br. 16) by which they mean speculation about actual effect. Had this case arisen on a motion directed to the pleadings, there might be room for speculation. But it did not so arise. It arose on a motion for summary judgment in which the district court directed respondents to take full discovery on the issue and then to submit whatever evidence they had. They submitted none. While a court does not find facts on a motion for summary judgment, it does determine whether there *is* a genuine issue of fact at all, and here the district court found that there was no genuine issue as to effect on interstate commerce. With that the Court of Appeals *did not* disagree.[3] On the contrary, it decided the case on the bare proposition that, *"as a matter of law,"* it is enough that asphaltic concrete is used by purchasers on roads which are segments of a highway which somewhere traverses state lines (see Petition, p. 8, and App., p. 10).

4. Respondents argue that "the decision of the court below can be sustained on two alternative grounds not considered in the opinion." (Br. 15). But the essential issue which calls for this Court's review is whether the basis on which the court below placed its decision is correct: whether the single fact that a building material is used by third party purchasers in construction of a road is enough to establish jurisdiction under the several antitrust acts which the complaint invoked.

The high function of certiorari jurisdiction is to settle important questions of law, not to decide cases on particular facts. The legal proposition announced by the court below being wrong, the writ should be granted. If it is claimed that other facts and other theories sustain respondents, the case can be remanded for determination below of those grounds.

3. Moreover, the district court's conclusion cannot be dismissed as a finding of fact, for the issue is jurisdiction, and that issue is determinable by a trial court even on affidavits. See fn. 11, p. 18 of Petition, and also *Rosen v. Rossmoor Corp.*, ... F.2d ...., 1973-2 Trade Cases ¶ 74,755 (9 Cir. Oct. 17, 1973).

CONCLUSION

Every street in every city and every road anywhere in the nation, unless it connects with no other, is part of an interstate network of highways. Is therefore the seller of anything used in a street or road "in commerce"? That is what the court below held. That holding, startling in itself, will launch still other law. It deserves review.

DATED: San Francisco, California, February 22, 1974.

Respectfully submitted,

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The following brief is the only one filed on behalf of the petitioners. Neither Gulf Oil Corporation nor Edgington Oil Company submitted a brief on the merits.

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In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,

Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Petitioners Union Oil Company of California and Industrial Asphalt, Inc.

OPINIONS BELOW

The opinion of the court below is reported in 487 F.2d 202 and is set out as Appendix B to the Petition for Writ of Certiorari. The opinion of the District Court is reported in 1972 Trade Cases ¶ 74,013 and is set out as Appendix A to the Petition.[1]

All emphasis in quotations has been added unless otherwise stated.

1. Appendices to the petition are hereafter referred to as "Pet. App." with page number. The single Appendix will be referred to simply as "App."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1292(b). Its judgment was entered October 3, 1973. Petition for Writ of Certiorari was filed December 28, 1973, and a writ was granted on March 25, 1974, ... U.S. ....., 94 S.Ct. 1586. The very questions at issue are whether the District Court had jurisdiction, which was invoked under Clayton Act § 4 (15 U.S.C. § 15) and 28 U.S.C. § 1337.

QUESTIONS PRESENTED

This case has to do with a commodity, asphaltic concrete—made in California in and around Los Angeles from California materials—sold and used in California in that area and by its nature incapable of being sold or used outside of the state or of being imported into California from without. Respondents, makers of the commodity in Los Angeles, sued petitioners, also located in California, claiming violation of the Robinson-Patman Act, Sections 3 and 7 of the Clayton Act, and Sections 1 and 2 of the Sherman Act. The District Court held that it lacked jurisdiction for want of the jurisdictional prerequisites of the several Acts relative to interstate commerce. The court below reversed solely upon the fact that asphaltic concrete is used as a topping for roads and streets in California, some of which are segments of interstate highways. For that reason it held that the producers of the commodity are "instrumentalities" of interstate commerce and, proceeding from that premise, it held that the producers were "in commerce" so as to satisfy the requirements of the several Acts "as a matter of law."

The questions as to which the Court granted the writ are as follows:

With respect to a commodity which is not only made and sold in one state alone but is only salable and usable in that state,

does the fact that it is used in an instrumentality of commerce such as a highway supply the necessary requirements, by itself and as a matter of law

(a) Of the anti-discrimination clause of the Robinson-Patman Act that the discriminatory sale be by a "person engaged in commerce, in the course of such commerce," that "either or any of the purchases involved * * * [be] in commerce," and that the "effect * * * may be substantially to lessen competition or tend to create a monopoly in any line of commerce"?

(b) Of Section 3 of the Clayton Act that the tying conduct be that of a "person engaged in commerce, in the course of such commerce" and that "the effect * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce"?

(c) Of Section 7 of the Clayton Act that the acquisition by a "corporation engaged in commerce" be of a corporation "engaged also in commerce," and that "the effect * * * may be substantially to lessen competition, or tend to create a monopoly", where the acquired corporation sold nothing in commerce and the product it made did not enter commerce?[2]

STATUTES INVOLVED

Title 28 U.S.C. § 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 730, as amended:

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2. The Court did not grant the writ as to a fourth question, which read: "(d) Of Sections 1 and 2 of the Sherman Act that the restraint or monopolization be 'of trade or commerce among the several states or with foreign nations' where, factually, there is no effect on commerce?"

Section 1 (15 U.S.C. § 12):

" 'Commerce', as used herein, means trade or commerce among the several States and with foreign nations * * *."

Section 3 (15 U.S.C. § 14):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities * * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 4 (15 U.S.C. § 15):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 7 (15 U.S.C. § 18):

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * * of any other corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. * * * *"

Robinson-Patman Act, Section 2(a), Act of June 19, 1936, c. 592,49 Stat. 1526, 15 U.S.C. § 13, subd. (a):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where ether or any of the purchases involved in such discrimination are in commerce * * * * where the effect of such dscrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce * * * *."

STATEMENT OF THE CASE

A. Basic Facts

Unless otherwise stated, the facts are taken from the opinions below (Pet. App. A and B). They are not in dispute.

Respondents (hereafter sometimes called "Copp") are Los Angeles merchants of asphaltic concrete, a substance used as "blacktop" for streets, roads and driveways. Copp sued petitioners and one other for treble damages, claiming violation of Sections 1 and 2 of the Sherman Act,[3] Section 2(a) of the Robinson-Patman Act,[4] and Sections 3 and 7 of the Clayton Act,[5] all in the marketing of asphaltic concrete in California in and around Los Angeles (Pet. App. 1-3).

Copp's complaint also claimed antitrust violations in the marketing of liquid petroleum asphalt (Pet. App. 1-3), and in this respect the complaint was similar to and part of the so-called *Western Liquid Asphalt Cases*, 350 F.Supp. 1369 (N.D. Cal. 1972), reversed *sub nom., State of Alaska v. Standard Oil Company of California*, 487 F.2d 191 (9 Cir. 1972), cert. denied, ...U.S....., 94 S.Ct. 1419 (Feb. 19, 1974). But proceedings occurred in the district court "to eliminate from the case the issues which are not

3. 15 U.S.C. §§ 1, 2.
4. 15 U.S.C. § 13, subd. (a).
5. 15 U.S.C. §§ 14, 18.

common to the remainder of the Western Liquid Asphalt Litigation," (Pet. App. 2), that is to say, to eliminate the aspects concerning asphaltic concrete and leave the case pending only as to liquid asphalt.

Unlike liquid asphalt, asphaltic concrete does not and cannot enter into interstate commerce. It is manufactured at facilities known as "hot plants" by combining about 95% of rock, sand, and other aggregates with about 5% liquid petroleum asphalt. The fundamental fact is that asphaltic concrete must be delivered hot and is of great weight and low value; therefore it can only be sold within 30 or 35 miles of the place of manufacture. Copp's plant was in suburban Los Angeles and competed with other Los Angeles hot plant operators. No hot plant in the Los Angeles area delivered or ever could deliver asphaltic concrete outside California. All such plants manufactured their product from aggregates mined at local pits and liquid asphalt manufactured at Los Angeles refineries (Pet. App. 1-3). As the District Court summed up (Pet. App. 3):

> "While liquid asphalt moves in interstate commerce, the liquid asphalt used by plaintiffs and their competitors all comes from the State of California, which is an exporter of liquid asphalt. The aggregates used likewise are produced in California. The jurisdictional problem arises out of the fact that plaintiffs and plaintiffs' competitors manufacture a product out of California raw materials for sale and delivery in California.
>
> * * *
>
> "As indicated, asphaltic concrete does not move in interstate commerce except under exceptional circumstances, none of which are present here."

Petitioners Gulf Oil Corporation ("Gulf"), Union Oil Company of California ("Union"), and Edgington Oil Company ("Edgington") produced liquid petroleum asphalt, but they did not make or sell asphaltic concrete (Pet. App. 9-10).

Petitioner Industrial Asphalt, Inc. ("Industrial") and a fifth defendant, Sully-Miller Contracting Company ("Sully-Miller") were Los Angeles hot plant operators competing with Copp in the local asphaltic concrete trade. Unlike Sully-Miller, Industrial also was a marketer of liquid asphalt.

The Robinson-Patman charges made by the complaint with respect to asphaltic concrete are that Industrial and Sully-Miller sold that substance at discriminatory prices (Pet. App. 2).

The Clayton Act, § 3, charges are that Industrial and Sully-Miller sold asphaltic concrete pursuant to "unlawful extraction from customers of agreements not to use or deal in plaintiff's products or services" (Pet. App. 2).

The Clayton Act, § 7, charges are that Union acquired the capital stock of Sully-Miller, and that Gulf acquired Industrial (Pet. App. 10).

B. Proceedings in the District Court

As stated by the district court (Pet. App. 2):

> In December 1971 it appeared to the court that there were potential jurisdictional problems which should be decided prior to the large-scale discovery on the merits which the plaintiffs proposed. The court ordered that discovery be directed to the jurisdictional problems, * * *."

(And see also App. 49-50).

After discovery had disclosed all relevant facts and Copp had had full opportunity to develop them, Copp was directed by the court to point to some evidence of jurisdiction (Pet. App. 2). Copp's showing rested on two facts: (1) that some of the streets and roads in California in the 35 mile radius around Los Angeles are segments in the interstate highway system, although none of the parties supplied asphaltic concrete for use within two hundred miles of any interstate crossing of the California border; (2) a stipulation that the quantity of asphaltic concrete so used in those

roads and streets was not *de minimis* (Pet. App. 3). On these facts Copp offered the bare argument that "the use of asphaltic concrete in the interstate highway puts it 'in commerce'" (Pet. App. 3, 4). The district court rejected this argument. And no other jurisdictional theory being urged or supported, the court entered the following orders (Pet. App. 7-8):

> (a) As Sully-Miller neither produced nor marketed liquid asphalt, the order was a summary judgment of dismissal in its favor.
>
> (b) As the other defendants were marketers of liquid asphalt, a product shipped in interstate commerce, they were kept in the case with respect to all charges concerning that substance, but the charges concerning marketing of asphaltic concrete were carved out as was the charge about Union's acquisition of Sully-Miller. Because Industrial is also a marketer of liquid asphalt, the charge about Gulf's acquisition of Industrial was also left in the case.

C. Proceedings in the Court of Appeals

From this decision Copp was allowed an interlocutory appeal to the court below under 28 U.S.C. § 1292(b). That court reversed (Pet. App. 15), saying:

> "We hold that the production of asphalt for use in interstate highways rendered the producers thereof 'instrumentalities' of interstate commerce and placed them 'in' that commerce *as a matter of law*." (Pet. App. 10)

In short, although asphaltic concrete in the Los Angeles area can be made solely in California from California materials, is and can be sold and used only in California, and cannot be sold or used outside that state, the court held that there was jurisdiction of all the claims asserted in the complaint as amended. And it held all this, *as a matter of law*, solely because California roads and streets in which the asphaltic concrete is used are segments of a highway system that is interstate.

The court did not pass on the dismissal of Sully-Miller; it held (Pet. App. 15) that as the dismissal was a complete disposition of the case against Sully-Miller, an appeal could be taken from that part of the order only under F.R.Civ.P. Rule 54(b), and, as no order under Rule 54(b) had been made, no appeal lay.[6] Consequently, Sully-Miller is not before this Court.

D. The Issues Before This Court

Since the Writ was not granted as to the Sherman Act questions (see fn. 2 at p. 3, above), and since the case as it comes here has nothing to do with the claims concerning liquid petroleum asphalt, petitioners Gulf and Edgington are not concerned with the issues before this Court. They neither make nor sell asphaltic concrete and were involved in the appeal only because of the Sherman Act charge that they were co-conspirators in the alleged conspiracy to fix prices of asphaltic concrete. The issues now before the Court are:

1. Whether the prohibitions of the Robinson-Patman Act against price discrimination and of Clayton Act, § 3, against tying, apply to Industrial in the sale of asphaltic concrete.

2. Whether the Celler-Kefauver Act (Clayton Act, § 7) applies to Union's acquisition of the stock of Sully-Miller.

SUMMARY OF THE ARGUMENT

I.

Two basic considerations are common to the several statutes involved in this case: (1) by the Robinson-Patman and Clayton

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6. Rule 54(b) provides that where there are multiple parties to a case, an order disposing of the case as to fewer than all the parties is not appealable unless the order specifies that there is no just reason for delay, and expressly directs the entry of judgment. The court below evidently believed that compliance with this requirement of Rule 54(b) was missing. While we think the court erred in holding that an appeal did not lie also under 28 U.S.C. § 1292(b), the petition for certiorari did not present that question inasmuch as disposition of the issues as to the other parties would also settle the law as to Sully-Miller.

Acts Congress did not exercise all its constitutional power under the Commerce Clause, as it is said of the Sherman Act, but confined the reach of each of these Acts by explicit language. (2) As the governmental structure of the Nation is federalism, the reach of federal statutes should not be stretched beyond the fair intendment of their language where to do so would impose on local affairs standards of conduct in conflict with state policy.

II.

Relative to the Robinson-Patman Act: Jurisdiction under Robinson-Patman is far narrower than under the Sherman Act. While the latter is concerned with effect or impact of conduct regardless of where the conduct occurs, effect or impact is but one of four tests of jurisdiction all mandated by the express terms of the Robinson-Patman Act. The other three are that the act of discrimination be by a person "engaged in commerce", "in the course of such commerce", where there are two or more sales at least one of which is "in commerce". The unbroken mass of authority, until the decision below, is that "at least one of the two transactions which, when compared, generate a discrimination, must cross a state line". Here no sale did.

The court below dismissed the "state line test" because the commodity sold is used in roads—at least 200 miles from any interstate border—and is therefore "linked to an instrumentality of commerce." To translate that notion of "instrumentality" into the statutory requirement of "in commerce", the court started with the analogy of the Fair Labor Standards Act. But, while that Act by its terms applies where the employees are either "engaged in commerce" or "engaged in the production of goods for commerce", Robinson-Patman does not offer the alternative of "engaged in the production of goods for commerce". In *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953), this Court held that, while workers supplying commodities used in repairing roads are

not "engaged in commerce", they are "engaged in production of goods for commerce" for purposes of the Fair Labor Standards Act in view of the particular legislative history of that Act. The court below fallaciously jumped to the conclusion that for the purposes of a different Act such employees are "engaged in commerce", a quite different concept. If instead of selling asphaltic concrete to the road builder or repairman, petitioner Industrial had itself built or repaired roads at discriminatory charges, its conduct would not fall within the Robinson-Patman Act because no sale of goods would be involved. *General Shale Products Co. v. Struck Constr. Co.*, 132 F.2d 425 (6 Cir. 1942), cert. denied, 318 U.S. 780 (1943). Yet, here, where its conduct was one step farther away from the roadwork, the decision below has brought it within the Robinson-Patman Act by transmuting the "engaged in the production of goods for commerce" of a different Act into the "engaged in commerce" of Robinson-Patman.

Not only was the leap from "engaged in production of goods for commerce" to "engaged in commerce" unwarranted, there was no basis for looking to the Fair Labor Standards Act at all. The "translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business" and particularly unwarranted where it would extend federal control over local matters. *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349, 353 (1941). The economic and social philosophy underlying Robinson-Patman is one of the most hotly criticized in trade regulation, for it conflicts with the goal of hard competition of the Sherman Act and like state legislation. *E.g., Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 249 (1951). Therefore California has deliberately rejected and refused to enact Robinson-Patman type legislation. *Harris v. Capitol Records Distributing Corp.*, 64 C.2d 454, 413 P.2d 139 (1966). The explicit jurisdictional limitations of Robinson-Patman should not be relaxed so as to impose on California trade regulation for local affairs that California has rejected.

III.

Relative to Clayton Act, § 3: This statute contains a similar requirement as to effect as Robinson-Patman and the identical requirement that the conduct be by "a person engaged in commerce, in the course of such commerce". The court below upheld jurisdiction of the Section 3 claim on the same reasoning as the Robinson-Patman claims. Its decision must fail for the same reason. It is in direct conflict with *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416 (5 Cir. 1972), and not in accord with the jurisdictional requirements of Section 3 as taught in *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1947).

IV.

Relative to Clayton Act, § 7; the anti-merger Act: Like the other two Acts, this requires, in addition to the effect on commerce, that *each* of the acquiring and acquired corporations be a "corporation engaged in commerce". Here the acquired corporation was not, it being a wholly local manufacturer of a product from local materials selling it locally to be affixed, or affixing it, to local real estate.

State and federal policy differ about prohibiting acquisitions on the "incipiency" philosophy of Section 7. The consequences of acquisition by an interstate corporation of other such corporations can be quite different from that of an acquisition of a local concern, for local acquisitions are often the means by which local communities grow. The distinction is recognized by authorities. For that reason the new Uniform State Antitrust Act contains no anti-merger provisions. Section 7 should not be subjected to subtleties of interpretation that inject it into local affairs contrary to local policy.

The decision below treats the acquired corporation as "in commerce" by the same reasoning employed in its decision of the Robinson-Patman question, and it is equally fallacious here.

In *United States v. American Building Maintenance Industries*, No. 73-1689, on appeal to this Court by the United States, the government argues that Section 7 should be read as if the sole jurisdictional requirement were one of "affecting commerce". But Section 7 contains the double requirement of effect on commerce and "in commerce", and the latter cannot be jettisoned on an argument that Congress would be justified in broadening the reach of the statute. In limiting the statute, Congress gave recognition to the various considerations competing for attention. By 1950, when the Section was thoroughly rewritten and expanded into the Celler-Kefauver Act, the wide distinction between "in commerce" and "affecting commerce" was well established; nevertheless the double test of jurisdiction was retained.

Finally, the acquisition had no effect of lessening competition or tending to create a monopoly in a line of commerce. It was the duty of the district court to determine the existence of this jurisdictional element, and on all the evidence it found not even an issue of fact on the matter.

ARGUMENT

I. Basic Considerations Common to the Three Statutes Involved

We shall separately discuss the situation as respects each of the three statutes involved, the Robinson-Patman Act and Sections 3 and 7 of the Clayton Act. But two basic considerations pertain to all three.

First: Although, as it has been said, by the Sherman Act Congress exercised all the constitutional power it possesses under the Commerce clause, Congress plainly did not do so in enacting any of the three statutes now before the Court. By the most explicit selection of language, the reach of each of these statutes was confined.

Second: The governmental structure of this Nation is one of federalism. The Court has reemphasized that truth and its consequences in the recent past, *Younger v. Harris*, 401 U.S. 37, 44

(1971). There are subject matters on which federal view and state view of sound policy conflict. Where a federal statute *both* plainly applies to a situation and can do so constitutionally, it is paramount. Where interpretation of the reach of the federal statute is debatable, due regard to "our federalism" counsels restraint. And in no event should federal statutes be subjected to procrustean treatment in order to direct what are essentially local affairs in a manner in conflict with state policy; the reach of federal statutes should not be expanded cavalierly where to do so is to impose on local affairs standards of conduct in conflict with state policy. The Court has stated these fundamentals at length in the very context of federal laws resting on the Commerce Clause, in *Kirschbaum v. Walling,* 316 U.S. 517 (1942) where it said (p. 520): "Federal legislation of this character cannot therefore be construed without regard to the implication of our dual system of government." And in *Younger v. Harris, supra,* the Court, per Mr. Justice Black, said (p. 44)

> "* * * the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This * * * is referred to by many as 'Our Federalism,' * * *. The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. * * * What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

In short, the question in cases like this is not how far Congress could go, but how far it has gone, and in deciding that question respect must be paid both to the language Congress chooses to express its wish and to the federal structure of the Union, and

with wary appreciation that "[t]he federal camel has a tendency to occupy permanently any State tent."[7]

II. There Was No Jurisdiction of the Robinson-Patman Claim of Price Discrimination

To recapitulate, the Robinson-Patman claim is that Industrial sold asphaltic concrete at discriminatory prices (Pet. App. 2), but all its sales from its California plants,[8] and all of Copp's, occurred in California and were sales of California produced materials (Pet. App. 3, 9-10). Not only were they; they had to be, because asphaltic concrete is made from local rock, sand, and asphalt and must be sold and used within a very short time after it is manufactured and within a few miles of where it is made.

A. BY EXPRESS TERMS, THE ROBINSON-PATMAN ACT IS OF LIMITED REACH

Jurisdiction under Robinson-Patman is much narrower than under the Sherman Act. The contrast has been made repeatedly in the cases. The Sherman Act reaches conduct "in restraint of trade or commerce" or which monopolizes or attempts to monopolize or restrain trade or commerce; it is concerned with the effect or impact of an act regardless of where the act occurred. *E.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219 (1948). But it is not so with respect to the Robinson-Patman Act. "Jurisdiction under the Robinson-Patman Act is very different from jurisdiction under the Sherman Act," *Lehrman v. Gulf Oil Corp.,* 464 F.2d 26, 36 (5 Cir.), cert. denied, 409 U.S. 1077 (1972). Or, as said in *Walker Oil Company v. Hudson Oil Company of Missouri,* 414 F.2d 588, 589 (5 Cir. 1969), cert. denied, 396 U.S. 1042 (1970), "We note initially that the juris-

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7. Douglas, J. in *Federal Power Commission v. Florida Power & Light Co.,* 404 U.S. 453, 476 (1972).

8. Industrial also operated two plants outside California, but all its plants sold and delivered asphaltic concrete only locally within the state of manufacture. (See App. 117).

dictional commerce coverage of this section falls short of the coverage possible under Congress's Commerce Clause power or that of the broader Sherman Anti-Trust Act".

If Robinson-Patman had proscribed discriminatory sales wherever the effect may be substantially to lessen competition or tend to create a monopoly in a line of commerce, arguments about jurisdiction similar to those applicable to the Sherman Act would be germane. But *effect* is only one of four tests of that Act. The Act not only requires that the effect of the alleged discrimination may be to substantially lessen competition or tend to creat monopoly in any line of commerce, but it also imposes three other limitations:

> (1) The act of discrimination must be by a person "engaged in commerce";
>
> (2) The act of discrimination must be committed "in the course of such commerce * * *
>
> (3) where either or any of the purchases involved in such discrimination are in commerce."

Thus there must be (1) the *effect* on commerce, (2) resulting from an act committed by one engaged in commerce, where, in addition, (3) that act occurs in the course of the commerce and where, further, (4) the act consists of two or more sales at least one of which is in commerce.

These express restrictions of the Act cannot be escaped. They plainly require that at least some of the sales complained of cross state lines. *E.g., Standard Oil Co. v. Federal Trade Commission,* 340 U.S. 231, 236-238 (1951); *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115, 118-120 (1954). The plain meaning of the statutory language is found in the statement of Congressman Utterback, manager of the bill in the House (80 Cong. Rec. 9417):

> "Where, however, a manufacturer sells to customers *both within the State and beyond the State,* he may not favor either to the disadvantage of the other; he may not use the

> privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade."[9]

Rowe, *Price Discrimination Under the Robinson-Patman Act,* pp. 77-83 states, with much citation:

> "Courts apply Sherman Act proscriptions to restrictive or monopolistic business activities wherever they occur, so long as interstate commerce is 'affected.' On the other hand, the price discrimination clauses of Robinson-Patman require that the discriminator be 'engaged in commerce,' that the challenged discrimination occur 'in the course of such commerce,' and that 'either or any of the purchases involved in such discrimination are in commerce . . .' Any broader interstate commerce reach of Robinson-Patman is refuted by its legislative history, for the Senate-House Conference struck a clause in the House bill which would have adopted the 'effect on commerce' criterion."

In *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.,* 469 F.2d 416, 418 (5 Cir. 1972), the court observed that the "failure of any party to have any interstate business disposes of the Clayton and Robinson-Patman Act claims." The same court, sitting *en banc* in *Littlejohn v. Shell Oil Company,* 483 F.2d 1140, 1144, cert. denied, 414 U.S. 1116 (1973), referred to at least one interstate sale as the "sine qua non" of Robinson-Patman jurisdiction.

Repeatedly courts have used these words:

> "At least one of the two transactions which, when compared, generate a discrimination, *must cross a state line."*

Belliston v. Texaco, Inc., 455 F.2d 175, 178 (10 Cir.), cert. denied, 408 U.S. 928 (1972); *Walker Oil Company v. Hudson Oil Company of Missouri,* 414 F.2d 588, 589 (5 Cir. 1969), cert. denied,

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9. This is quoted in *Moore v. Mead's Fine Bread,* supra, at 120.

396 U.S. 1042 (1970); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 37 (5 Cir.), cert. denied, 409 U.S. 1077 (1972); *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7 Cir. 1973), cert. denied, ... U.S. ...., 94 S.Ct. 899 (1974); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 208-09 (5 Cir. 1969).

Accord: Borden Co. v. Federal Trade Commission, 339 F.2d 953 (7 Cir. 1964); *Willard Dairy Corp. v. National Dairy Prods. Corp.*, 309 F.2d 943 (6 Cir. 1962), cert. denied, 373 U.S. 934 (1963), and many others.

B. A SUPPLIER OF A SUBSTANCE USED IN A ROAD IS NOT THEREBY IN COMMERCE NOR IS THE INTRASTATE SALE TO THE USER A SALE IN COMMERCE

The court below refused to follow this settled law which it belittled as a mere "state line test". By a chain of reasoning consisting of five links, it concluded that the "in commerce" requirements of the Act were met although nothing crossed a state line. The chain of reasoning is not spelled out, but it is implicit, and every link must be sound or the chain will not hold. We examine each.

1. The First Link in the Chain of Reasoning Below and Its Unreality

The first link is to say that, as asphaltic concrete is incorporated in local physical objects—roads—over which commerce passes, the asphaltic concrete is "closely linked to an instrumentality of interstate commerce" (Pet. App. 14-15). But the Robinson-Patman Act says nothing about "instrumentalities of commerce". Because it requires that the alleged discriminatory sales be by a person "engaged in commerce, in the course of such commerce * * * where either or any of the purchases involved in such discrimination are in commerce," the court below was under the necessity of translating the notion of "instrumentality of commerce" into the concept of "in commerce".

We submit that this very first link is forged from unreality. In *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), which arose under the Fair Labor Standards Act, the Court said (p. 128):

> "And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations."

In *United States v. Yellow Cab Company*, 332 U.S. 219 (1947), dealing with the Sherman Act, where the test of jurisdiction is far less restrictive than under the Clayton Act, the Court held that a restraint on transportation of passengers and their luggage between railroad stations in Chicago on an interstate journey was a restraint on interstate commerce, but that a restraint on the service of taxicabs in conveying interstate passengers between their homes and railroad stations was not. Acknowledging that, in a sense, a traveler begins his interstate journey when he boards a conveyance near his home, hotel or office and ends it when he alights from a conveyance at his ultimate destination:

> "But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business." (p. 231)

In the present case the smooth statement that the asphaltic concrete is used in segments of the interstate highway system, while literally true, inflates reality. *Overstreet* involved a drawbridge which, when down, blocked an interstate waterway, and a toll road which was the only available interstate passage between two points. But here *not one of the roads or streets blacktopped by the asphaltic concrete in this case is within 200 miles of where any highway crosses the California border into another state.* To assert that the asphaltic concrete is linked to an instrumentality of interstate commerce in any real sense is simply not a practical concept.

But assuming that the first link is sound, the next three by which the court reaches the conclusion that both the parties and the sales are "in commerce" are rankly fallacious.

2. The Second Link

The court turned to the Fair Labor Standards Act (Act of June 25, 1938, c. 636, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201, et seq.), the pertinent provision of which is Section 6(a) (29 U.S.C. § 206(a)):

> "Every employer shall pay to each of his employees who in any workweek is engaged *in commerce or in the production of goods for commerce,* or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: * * * *"[10]

The court below turned to *Alstate Construction Co. v. Durkin,* 345 U.S. 13 (1953) for its holding that, for purposes of the Fair Labor Standards Act, an employee "is engaged in the production of goods for commerce" if the goods he makes enter into an instrumentality of commerce. But this Court so held only because of the legislative history of that particular Act. As the bill passed the Senate, it required not only that the goods be produced for commerce but that the production must be "of goods for transportation in commerce". It was because "Congress left those words out of the bill as passed" that this Court, over a strong dissent, reached its conclusion about the meaning of the words as used in that Act (345 U.S. at 15).

3. The Third Link

But, even if it were permissible upon the basis of *Alstate* to characterize a maker of asphaltic concrete as one "engaged in the production of goods for commerce," that falls short of supporting jurisdiction under Robinson-Patman. The Fair Labor Standards

10. Until 1966, the words "or is employed in an enterprise engaged in commerce or in the production of goods for commerce" were not in Section 6(a). They were incorporated into the Act in 1961 in a Section 6(b) (Act of May 5, 1961, Pub. L. 87-30, § 5, 75 Stat. 67). In 1966 the words were transferred to Section 6(a) (Act of Sept. 23, 1966, Pub. L. 89-601, Tit. III, 80 Stat. 838-840).

Act confers jurisdiction in the alternative, either where the employee is "engaged in commerce" or where he is "engaged in production of goods for commerce." But, unlike the Fair Labor Standards Act, the Robinson-Patman offers no alternative to "in commerce"; it permits no fall-back to "production of goods for commerce". Either a sale is "in commerce" or the Act does not apply.

The next link in the chain of reasoning below was to recast the proposition that "one is engaged in the production of goods for commerce" into a quite different statement that he is thereby "engaged in commerce". That is a false step, and it is shown to be false by the *Alstate* case itself. In *Alstate* the question was whether workers engaged in supplying commodities used in repairing roads could claim the minimum wage protection of the Fair Labor Standards Act. This Court recognized as a premise that these workers are not "engaged in commerce". It was for that reason it looked further, to the provision that the Act applies also to those engaged "in the production of goods for commerce". Thus what this Court regarded as two separate concepts the court below silently treats as one.

In the *Alstate* case Justices Douglas and Frankfurter dissented from the holding that those engaged in working on roads were even engaged in "production of goods for commerce"; the opinion of Mr. Justice Douglas said (345 U.S. at 17):

> "The Court reasons that if the man who is building or repairing an interstate highway is 'engaged in commerce,' the one who carries cement and gravel to him from a nearby pit is 'engaged in the production of goods for commerce.' Yet if that is true, how about the men who produce the tools for those who carry the cement and gravel or those who furnish the materials to make the tools used in producing the cement and gravel? Each would be essential to the highway worker 'engaged in commerce.' Yet the circle gets amazingly large once we say that 'the production of goods for commerce' in-

cludes the 'production of goods for those engaged in commerce.' "

We quote this passage to show that the holding of *Alstate* that "production of goods for those engaged in commerce" embraces "production of goods for commerce" offered difficulties. Yet, in the present case, the court below has made the leap that those supplying goods for use of those in commerce are themselves "in commerce," and it has done so in the teeth of the fact that the Robinson-Patman Act contains its own very express limiting language, whereas limiting language in the bill that became the Fair Labor Standards Act had been deleted before passage.

4. The Fourth Link

Fallacious as is the third step of the reasoning, there is still a fourth step. The court below tacitly recast the holding that an employee is engaged in commerce into one that the employer is so engaged. Yet *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), dealing with the Fair Labor Standards Act, shows that the two are not synonymous, although for some purposes they may be. In *Overstreet* the employees seeking the minimum wages provided for by the Fair Labor Standards Act were operators, repair and maintenance workers, and the like on a toll road and drawbridge across the Intercoastal Waterway, which had to be raised frequently to permit the passage of boats in interstate commerce, and the toll road and bridge were the only means of certain interstate land transportation. The Court held that the fact that the employer was not engaged in commerce but only in providing facilities which those carrying on commerce may use (p. 131) was not reason to hold that the employees were not engaged in commerce. "The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the [Fair Labor Standards] Act depends on the character of the employees' activities" (p. 132). In *Mitchell v. Lublin, McGaughy & Asso.*, 358 U.S. 207, 211 (1959) the Court reiterated, with

respect to the issue whether "employees are 'engaged in commerce' as that term is used" in the Fair Labor Standards Act, that "[t]o determine the answer to this question, we focus on the activities of the employees and not on the business of the employer." Congress recognized that the fact that some employees are "in commerce" or "engaged in the production of goods for commerce" does not necessarily mean that the employer is. In 1961 Congress enlarged the Fair Labor Standards Act to cover those "employed in an enterprise engaged in commerce or in the production of goods for commerce" (see fn. 10 at p. 20, supra). Then, by also adding subdivision (s) to Section 3 (29 U.S.C. § 203), it specified that " 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce * * *." Thereby, if some employees are engaged in commerce or in the production of goods for commerce, all employees of the same employer come under the protection of the particular Act. The quoted portion of the definition of Section 3(s) would have been unnecessary if the fact that an employee is "in commerce" necessarily meant that the employer also is. This history again illustrates that in every case where Congress acts under the Commerce Clause the question does not stop with deciding how far Congress can constitutionally go; it turns also on how far it did go by the particular statute.

5. The Fifth Link

Moreover, the reasoning below ignores the fact that Robinson-Patman spells out not one but three requirements about "in commerce" in addition to its requirement about effect on commerce. The person who commits the act of discrimination must be "in commerce", but that is not enough. In addition, not only must the act of discrimination be commited "in the course of such commerce" but at least one of the sales involved in the discrimination must be in commerce. Congress cannot be charged with having tautologically specified the same requirement three times. Conse-

quently, even were it to be assumed that the chain of reasoning correctly brought the court below to the conclusion that Industrial was "in commerce", that reasoning cannot bring it to the conclusion that any of the "purchases involved in such discrimination are in commerce." The thrust of the statute is to eliminate discrimination between sales at least one of which must be in commerce. And a sale is not in commerce unless something crosses a state line.

The decision below is seen to be all the more anomalous when it is recalled that, if Copp were complaining that Industrial, while engaged in repairing or constructing highways (instead of merely selling asphaltic concrete), charged different rates to different contracting agencies, that complaint would not fall under the Robinson-Patman Act at all, for construction of a section of pavement is not the sale of a commodity. *General Shale Products Co. v. Struck Const. Co.*, 132 F.2d 425 (6 Cir. 1942), cert. denied, 318 U.S. 780 (1943). Yet here, where Industrial's act was one step farther away from the roadwork, the decision below has brought it within the Act.

In *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7 Cir. 1973), cert. denied, ... U.S. ....., 94 S.Ct. 899 (1974), plaintiff was a local asphaltic concrete producer and paving contractor seeking treble damages on purchases of crushed aggregates which it used in both paving and in the manufacture of asphaltic concrete. (Petition for Certiorari in this Court in No. 73-671, pp. 4, 7.) The Seventh Circuit affirmed a judgment directed for defendants because all the sales deemed relevant occurred in Illinois, saying (p. 767):

> "Initially, we should note that the scope of the Robinson-Patman Act amendments to the Clayton Act is significantly different from the Sherman Act's in this very requirement that one sale be 'in commerce.' * * * In contrast to the specific requirements of the Robinson-Patman Act, 'it appears settled that only those activities are beyond the reach of the Sherman Act which are "purely local" in the double sense that they (1) are not within the flow of interstate commerce and (2) have no significant effect on that flow.' * * * Thus, we do not presently need to consider whether Congress has the power to reach such discriminations as are alleged by Mayer Paving. What we must determine is whether Congress intended to reach such discriminations."

Mr. Justice Tom C. Clark, sitting by designation, dissented because defendant had shipped large quantities of crushed limestone from Illinois at discriminatory prices to asphalt manufacturers and paving contractors in Indiana, but he acknowledged that a complete lack of interstate sales, as here, is fatal to a Robinson-Patman claim. Said he (486 F.2d at 773):

> "This Circuit, I submit, correcly held that Borden's being in interstate commerce was not enough; 'it must also be shown that the sale complained of was one occurring in interstate commerce.' 339 F.2d 953, 955."

Here neither Copp nor Industrial sold or shipped in interstate commerce.

C. THE DECISION BELOW INTERPRETS THE ACT IN A MANNER UNWARRANTABLY INTRUDING ON THE PUBLIC POLICY OF CALIFORNIA

We have just submitted that, even if it were permissible to look for light to decisions under the Fair Labor Standards Act, the decision below fails. But there is no basis for looking to the Fair Labor Standards Act at all. That is precisely the kind of course which this Court rejected in *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941). There the Federal Trade Commission sought to extend the authority granted by Section 5 of the Federal Trade Commission Act over "business practices employed in *interstate commerce*" (p. 350) to local affairs by analogy to the authority accorded the Interstate Commerce Commission in the *Shreveport* case.[11] The invitation to "thus give a federal agency pervasive control over myriads of local businesses

11. *Houston, E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342 (1914).

in matters heretofore traditionally left to local custom and control" was declined, this Court observing that "translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business." 312 U.S. at 353-55.

This must be all the more true if proper regard is to be paid to our federalism, as *Bunte* emphasized (p. 351):

> "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. See for example, National Labor Relations Act, §§ 2(7), 9(c), 10(a), 49 Stat. 450, 453, 29 U.S.C. §§ 152(7), 159 (c), 160(a); Bituminous Coal Act, § 4—A, 50 Stat. 83, 15 U.S.C. § 834; Federal Employers' Liability Act, § 1, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. § 51. * * * But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in § 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated.
>
> * * *
>
> "The problem now before us is very different from that which was recently presented by *United States v. Darby,* ante, p. 100. We had there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act. *This case presents the narrow question of what Congress did, not what it could do.*" (p. 355)

California has no Act like the Robinson-Patman, not because of oversight or inaction but because California has deliberately rejected the social or economic policy on which Robinson-Patman rests. The economic philosophy underlying statutes of the Robinson-Patman type is one of the most hotly debated and criticized in the whole sweep of trade regulation; no legislation has created more confusion and difficulties in the effort to apply it to day-to-

day transactions. No subject has cried more for the most careful consideration of legislatures. It is fundamental public policy of California, as well as of federal antitrust laws, to promote competition through prohibition of methods which lead to price uniformity. Under the Sherman Act and California's "little Sherman Act", the Cartwright Act (Cal. Bus. & Prof. Code § 16,720), price uniformity is suspect. Yet price uniformity is the designed purpose and necessary consequence of price discrimination legislation like Robinson-Patman. In *Standard Oil Co. v. Federal Trade Commission,* 340 U.S. 231, 249 (1951), this Court cited economists that "in theory the Robinson-Patman Act as a whole is inconsistent with the Sherman and Clayton Acts." In *Automatic Canteen Co. v. Federal Trade Commission,* 346 U.S. 61 (1953), the Court noted that enforcement of the Robinson-Patman Act might "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (p. 63) that the Act may rest upon and create "policies in conflict with those of the Sherman Act" (p. 74). The leading work on the Robinson-Patman Act, Rowe, *Price Discrimination Under the Robinson-Patman Act,* (Little, Brown & Company, 1962) comments (pp. x, xi) on "the clashes of public policy surrounding its enforcement," and adds:

> "Critics denounce the Act, in important areas of its application, as an anti-antitrust law incompatible with the Sherman Act's mandate of free and competitive pricing as the prime instrument of economic progress for the benefit of the consumer."

Mr. Justice Jackson called the statute "complicated and vague" to a degree "almost beyond understanding." *Federal Trade Commission v. Ruberoid Co.,* 343 U.S. 470, 483 (1952). Professor Corwin D. Edwards, formerly Chief Economist of the Federal Trade Commission, in a speech to a meeting of the Antitrust Section of the American Bar Association in April 1964 (24 A.B.A. Antitrust Section, p. 70) spoke at length on the conflict

between the policies and purposes of the Sherman and Robinson-Patman Acts:

> "In the business community, in the bar and in Congress, there is a deep cleavage of opinion between those who consider the Robinson-Patman Act an invaluable and indeed an indispensable safeguard, both for small business and for the maintenance of competition, and those who consider it as destructive of competition. * * * Similar differences of opinion and fluctuation of opinion are evident in Congress . . ."[12]

With these criticisms in mind, the legislature of California has several times declined to enact a Robinson-Patman kind of price discrimination law. In *Harris v. Capitol Records Distributing Corp.*, 64 C.2d 454, 413 P.2d 139 (1966), a unanimous court, affirming a summary judgment of dismissal, recognized that the legislature had declined to enact Robinson-Patman legislation and refused to interpret certain legislation as having that effect.

We submit that the jurisdictional limitations of the Robinson-Patman Act cannot and should not be relaxed so as to impose on California trade regulation for local affairs that California has rejected. It need not be asked whether Congress could do so, for it has not done so. The language of the Act is plain.

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12. Senator Keating of New York, later a justice of the New York Court of Appeals and still later Ambassador to India and then to Israel, in an address at the same session of the Antitrust Section, said (24 A.B.A. Antitrust Section, p. 60) (italics in original):

> "At the outset, do we need *any* price discrimination legislation as such? Can there be such legislation without limiting the haggling in the marketplace that is essential to free and competitive pricing?
>
> * * * *
>
> "It is a myth that Robinson-Patman is the Magna Carta of small business. * * *
>
> "It is a myth that Robinson-Patman commands the respect of the business community. * * *" (p. 62)

III. There Was No Jurisdiction of the Claim Under Section 3, Clayton Act

Invoking Clayton Act § 3 (15 U.S.C. § 14), Copp claimed that Industrial sold asphaltic concrete pursuant to "unlawful extraction from customers of agreements not to use or deal in plaintiffs' products or services." Copp's products and services were and could be sold and used only in California in and around Los Angeles (Pet. App. 2-3), and Industrial's sales of asphaltic concrete were similarly circumscribed.

Clayton Act, § 3, is similar to Robinson-Patman in its requirement of effect.[13] Additionally, it requires, in the same language as Robinson-Patman, that the conduct be by a "person engaged in commerce, in the course of such commerce". The court below upheld jurisdiction on the same ground as it upheld jurisdiction of the Robinson-Patman claim (Pet. App. 13-14), and its decision must fail for the same reasons. It is in direct conflict with *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416 (5 Cir. 1972). There the court held (p. 418) that the lack of any interstate sales "disposes of the Clayton Act * * * claims."

This Court addressed itself to the jurisdictional provisions of Section 3 in *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1947). That case involved a vast program of exclusive dealing arrangements imposed throughout seven western states. Dealers in states outside California, buying products shipped to them from California, and California dealers, buying some products shipped to them from without the state (p. 314), were bound by the exclusive dealing contracts, so that the requirements of a

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13. In Robinson-Patman: "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce * * *."

In Clayton Act, Sec. 3: "where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be substantially to lessen competition or tend to create a monopoly in any line of commerce."

"person engaged in commerce, in the course of such commerce" were obviously present, and the case turned on "effect", as to which the Court said (337 U.S. at 314-5):

> "But the effect of appellant's requirements contracts with California retail dealers is to prevent them from dealing with suppliers from outside the State as well as within the State and is thus to lessen competition in both interstate and intrastate commerce. Appellant has not suggested that if these dealers were not bound by their contracts with it they would continue to purchase only products originating within the State."

The import of this statement is clear: the Act is not violated unless the commodities subject to the arrangement move in interstate commerce or the arrangements preclude the making of interstate sales. In the instant case, however, interstate commerce in asphaltic concrete made in and around Los Angeles does not and cannot exist.

IV. There Was No Jurisdiction of the Claim Under the Celler-Kefauver Act (Clayton Act, § 7)

Copp charged violation of Section 7 of the Clayton Act (15 U.S.C. § 18) by Union's acquisition of the capital stock of defendant Sully-Miller, a manufacturer and seller of asphaltic concrete and a paving contractor doing no interstate business of any kind (Pet. App. 7).

What is before the Court is whether the jurisdictional requirements of Section 7 relative to commerce are satisfied.[14] That same question has been presented to the Court in a government suit, *United States of America, appellant, v. American Building*

14. It is to be noted, *in limine*, that the questions whether a private party can base a claim for damages upon an acquisition violative of Section 7, and, if so, in what circumstances, are open questions some day requiring settlement by this Court. They are not, however, before the Court in this case because they were not passed on by either court below and therefore could not be presented in the petition for certiorari.

Maintenance Industries, No. 73-1689, in which the government's Jurisdictional Statement was filed May 10, 1974.

The situation with respect to Section 7 is much the same as discussed above with respect to Robinson-Patman. There is the same requirement of *effect*, in language almost identical with Robinson-Patman.[15] But *effect* is not enough. Also like Robinson-Patman, Section 7 prescribes more. The acquisition must be by a "corporation engaged in commerce". But even that is not enough. In addition, the acquired corporation must be "engaged also in commerce."

Here Union, the acquiring corporation, is a corporation "engaged in commerce". But Sully-Miller, the acquired corporation, is not. It is a hot plant operator, making asphaltic concrete locally from local materials, selling it locally to be affixed to local real estate or itself laying down the paving.

Here, as in the case of Robinson-Patman, state and federal policy do not coincide, and they diverge because a macroscopic merger or acquisition can have a different significance from a microscopic one. Congress has decided that the consequence of mergers or acquisitions by corporations engaged in commerce of others so engaged is injurious to the national weal if certain effects are even incipiently present. But local acquisitions may be the very means by which local communities grow, so that anti-merger legislation like Section 7 serves the public interest ill. In 1955, the Report of the Attorney General's National Committee to Study the Antitrust Laws observed (pp. 124, 125):

> "Summing up, then, mergers are a common form of growth; they may lessen, increase, or have no effect upon competition. A merger as such involves no necessary con-

15. Robinson-Patman: "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce."

Clayton Act, § 7: "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

> notations of coercion, dominance, or lack of effective competitive pressures. In addition, mergers may ease from the market companies which have failed in the competitive struggle and thus prevent potential bankruptcies. Finally they may spur operating economies by spreading overhead costs or enabling improved technology or management."

On August 2, 1973, the National Conference of Commissioners on Uniform State Laws approved a "Uniform State Antitrust Act" which received the support of the American Bar Association's House of Delegates on February 5, 1974. In a prefatory note the Commissioners observed:

> "However, there is a diversity of economic conditions and business problems in the many different states, and practices that are undesirable on a national scale are not necessarily undesirable, or even avoidable, in local areas."[16]

An introductory note in 4 CCH Trade Regulation Reporter, ¶ 30,101, calls attention: "Note that the Act contains no specific antimerger provision * * *." Commenting on this absence, CCH Trade Regulation Report, No. 111, February 11, 1974, states:

> "The Conference observed that 'many acquisitions in small or medium size communities will or may have a restraining effect upon trade in that community but are a natural part of the economic birth, life and even death of that community.' "

California has no general antimerger act; it addresses its regulation to specific matters like mergers of intrastate airlines.[17] One can speculate that a growing, bustling state like California would pause before adopting an incipiency theory of sweeping pro-

16. The text of the Act, without the prefatory note, appears in Vol. 4, CCH Trade Regulation Reporter, ¶ 30,101. The text with the prefatory note and comments is issued by National Conference of Commissioners on Uniform State Law, 645 North Michigan Avenue, Suite 510, Chicago, Ill. 60611.

17. E.g., Passenger Air Carriers Act, California Public Utilities Code § 2758.

hibition of acquisitions of local companies by national corporations. California's concern with attempts to control local acquisition by Section 7 is illustrated by its recent Motion for Leave to File Petition for Writ of Certiorari in *People of the State of California and the Public Utilities Commission of the State of California, petitioners, v. United States of America, respondent,* No. 73-7 in this Court. Thereby it sought to terminate a suit under Section 7 brought by the United States to prevent merger of two airlines flying solely between California points. Because the airplanes flew over international waters, the petition did not address itself to the question of commerce, and the matter was later voluntarily dismissed, 414 U.S. 801 (1973). But the episode emphasizes the consideration we here present, that a federal statute, written in plain limited terms, should not be impelled into local affairs by subtleties of interpretation. Doubtless Congress can prohibit that kind of acquisition. But the question before this Court is whether Section 7 should be stretched to reach what its words do not encompass.

Before this Court now there are two different lines of argument by which it is sought to expand Section 7. One is that of the court below. The other is that of the government in *United States v. American Building Maintenance Industries,* No. 73-1689 in this Court. We consider each.

A. THE LINE OF REASONING OF THE OPINION BELOW

By the chain of reasoning discussed at pp. 18-25, above, the court below concluded that Sully-Miller was "in commerce" although it neither sells nor ships in commerce. That chain of reasoning, we submitted above, is erroneous. Every street in every city, and every road anywhere in the nation, unless it connects with no other, is part of an interstate network of highways. Is therefore the seller of anything used in a street or road "in commerce"? By that reasoning, the local society for care of the blind, selling their brooms to the street sweeper, or the street cleaner itself, or the little tow truck operator removing illegally parked cars from

obstructing the street, all these are engaged "in commerce". We submit that such reasoning is not "guided by practical considerations" as taught in *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943) and *United States v. Yellow Cab Co.*, 332 U.S. 219 (1947).

While Sully-Miller, in addition to making and selling asphaltic concrete, is also a paving contractor, it does its road and streetwork entirely in Southern California, and it does not thereby become a corporation "engaged in commerce". There is not that intimate connection between local road repair or paving and interstate commerce as there was in *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), between actual operation and maintenance of a drawbridge over an interstate waterway and the toll road over the bridge constituting the only land interstate connection. Again, too, it is to be emphasized that a holding under the Fair Labor Standards Act concerning whether an employee is engaged in commerce is no authority for holding a company to be "in commerce" for purpose of another Act. Thus in *Kirschbaum v. Walling*, 316 U.S. 517 (1942), the Court said (pp. 520-21):

> "The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual States. * * * Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government.
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> "* * * The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration. * * * Thus, while a phase of industrial enterprise may be subject to control under the National Labor Relations Act, a different phase of the same enterprise may not come within the 'commerce' protected by the Sherman Law. * * *"

B. THE LINE OF REASONING OFFERED BY APPELLANT IN THE BUILDING MAINTENANCE CASE

In *United States of America v. American Building Maintenance Industries*, No. 73-1689, on appeal to this Court by the United States, a building maintenance company with branches throughout the United States acquired the shares of one Los Angeles building maintenance company and merged into itself another. Both of the acquired companies were located in Southern California and performed maintenance services solely in buildings in California. The United States sued to assail the acquisitions under Clayton Act, Section 7. The district court entered summary judgment for defendant on the ground that neither acquired company was engaged in commerce. In its Jurisdictional Statement in this Court, the government in effect argues that the words "engaged in commerce" as used in Section 7 do not mean "engaged in commerce" but mean no more than "affecting commerce" in the Sherman Act sense.

The government's argument runs that, because the acquired companies serve customers who themselves are engaged in interstate commerce, Section 7 applies.[18] It is urged that Section 7 should be given a scope as wide as the Sherman Act, that the Sherman Act reaches all activities which substantially affect interstate commerce, and, therefore, that Section 7 should be read to apply to activities which affect interstate commerce.

The argument takes a form often found in efforts to expand the reach of a statute: It lauds the purposes of Section 7 and urges

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18. There is also an argument about the acquired companies purchasing supplies received from without the state, but, as that is not an element relevant to our case, we do not discuss it.

that the social good would be furthered by the broad regulation espoused. Legislation, it is argued, should be given a scope commensurate with its aim and purpose. The answer to this kind of argument is that while legislation should be given a scope commensurate with Congress's aims and purposes, that can be so only within the area expressly circumscribed by Congress, for Congress is the judge not only of the goals but of the means to achieve them and of the compromises required to satisfy all the competing social, economic and political factors pressed upon it. In *Kirschbaum v. Walling*, 316 U.S. 517 (1942), the Court reminded us (pp. 521-22):

> "We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. * * * Compare *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349. The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation."

The argument that Section 7 should apply wherever the acquisition may have effect on commerce founders on the fact that Section

7 specifies, not only that the acquisition must be such as may affect commerce, *but also that both acquired and acquiring corporations be "engaged in commerce"*. Efforts to go further should be addressed to Congress, where they may be subjected to consideration by the kind of machinery best adapted to the matter—legislative committees and the rest of the apparatus of the legislative process. *Lauritzen v. Larsen*, 345 U.S. 571, 593 (1953).

In the *Building Maitenance* case, the government suggests, albeit obliquely, that the words "engaged in commerce" in Section 7 should be interpreted as broadly as "affecting commerce" because "[a]t the time of the passage of the Clayton Act in 1914 the distinction between activities 'in commerce' and activities 'affecting commerce' had not been fully developed" (Jurisdictional Statement, fn. 7, p. 11). There is a twofold answer. Section 7 does contain an "affecting commerce" test in its provision about *effect*. But it *also* requires that both the corporations be "in commerce". The government's argument would simply eliminate two of the requirements and read the statute as if it contained only the one.

In the second place, whatever may have been true in 1914, by 1950 the distinction between "activities affecting commerce" and "in commerce" was stark and clear. The breadth of the Sherman Act had been stated, for example, in 1948 in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, and the contrasting limitations of the "in commerce" language in the Clayton, Robinson-Patman, and other Acts had already been expressed repeatedly, *e.g.*, *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941)[19]. In the *Bunte Bros.* case, in the passage

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19. For example, in 1943, in *Lewis v. Shell Oil Co.*, 50 F.Supp. 547, 549 (N.D. Ill.) the court had remarked, pointedly:

> "In an action brought under the Robinson-Patman Act it is necessary to allege and prove that the transactions complained of are actually in interstate commerce, while in actions brought under the Sherman Anti-Trust Act it is sufficient if the transactions complained of are shown to have affected interstate commerce."

quoted at p. 26, supra, the Court listed a whole group of statutes as evidence that when Congress wished to reach activities "affecting commerce," it knew how to do so with great clarity. Yet, in 1950, when Congress amended Section 7 extensively in order to expand its coverage in many other respects, it deliberately retained the "in commerce" language and the requirement that both the acquiring and acquired companies be "engaged in commerce".

In the *Building Maintenance* case, the government's Jurisdictional Statement quotes *Transamerica Corp. v. Board of Governors*, 206 F.2d 163, 166 (3 Cir. 1953) for a statement that by Section 7 Congress intended to go to the utmost extent of its constitutional power, just as in the Sherman Act. But the quotation is out of context. The portion of the Act there involved was that "No corporation shall acquire * * * the stock * * * of two or more corporations engaged in commerce where the effect may be * * *," etc. Transamerica Corp. had acquired the stock of many such corporations. But the acquired corporations were banks, and Transamerica argued that in the past Congress had not regulated banking business by legislation directed to corporations generally and had done so only by special banking legislation; and therefore, it argued, the language of Section 7, although express, plain, and applicable, should be contracted so as to exclude banks. It was in rejecting this argument that the court used the quoted language. What was attempted there and what is attempted here are at opposite poles. There it was sought to shrink the text of the Act from its natural coverage; here it is sought to expand it into a different kind of regulation. Neither course is permissible.

C. THERE WAS NOT EVEN AN EFFECT ON COMMERCE FROM THE ACQUISITION IN THIS CASE

Even were the argument of the government in *United States v. American Building Maintenance Industries* valid, it would not encompass the present case, for here the activity complained of had

no effect of substantially lessening competition or tending to create a monopoly in "a line of [interstate] commerce". The court below dismissed this requirement of Section 7 as going only to the merits of Copp's claims (Pet. App. 15). On the contrary, it is a jurisdictional prerequisite; and jurisdictional questions must be met and decided by the court before the trier of fact reaches the "merits" of a claim. *Wetmore v. Rymer*, 169 U.S. 115, 120-21 (1898); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-84 (1936); *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936). And so it is held of the jurisdictional requirements of the antitrust Acts. *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416, 418 (5 Cir. 1972); *Gough v. Rossmoor Corp.*, 487 F.2d 373 (9 Cir. 1973). In the *Rossmoor* case, the Ninth Circuit reversed a jury's specific finding that defendant's acts did not have a "substantial effect on interstate commerce or the flow of interstate commerce" and rejected the contention that the finding was conclusive of jurisdiction, saying, *inter alia*,

> "Except where the jurisdictional issue and the issues on the merits are factually 'completely intermeshed,' [citations omitted], it may well be the court's function to resolve factual disputes relevant to jurisdiction on motion under Rule 12(b)(1), Fed. R. Civ. P., rather than the jury's function to resolve such disputes in the trial of the case on the merits [citations omitted]." (p. 377)

In the present case the district court called on Copp to produce all the evidence it desired on the jurisdictional question, Copp did so (see p. 7, *supra*), and there was simply no genuine issue of fact on the subject. Thus, not only within its duty to pass on jurisdiction, but within F.R.Civ.P. Rule 56 the district court determined the issue. Assuming that the acquisition of Sully-Miller affected *any* kind of competition, it was not in "a line of [interstate] commerce." As the district court observed, there

were only two conceivable lines of interstate commerce. One was the exportation from California of liquid asphalt, as distinguished from asphaltic concrete. The liquid asphalt claims were left in the case, and the acquisition of Sully-Miller had nothing to do with interstate commerce in liquid asphalt (Pet. App. 6). The second conceivable "line of [interstate] commerce" was a hypothesized interstate commerce in the use of local roads, but the district court found no evidence to support any conclusion that the acquisition of Sully-Miller affected the use of roads (Pet. App. 6), saying:

> "There is no evidence which gives any substance to this possibility. *Cf. Uniform Oil Co. v. Phillips Petroleum Co.*, 400 F.2d 267 (9th Cir. 1968)."

CONCLUSION

The decision of the court below should be reversed, and the order of the district court reinstated, so far as they relate to the Robinson-Patman and Clayton Act claims.

Dated: San Francisco, California, June 6, 1974.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,

Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondents, Copp Paving Company, Inc., Copp Equipment Company, Inc., and Ernest A. Copp.

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IN THE

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Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondents, Copp Paving Company, Inc., Copp Equipment Company, Inc., and Ernest A. Copp.

Opinions Below.

The opinion of the court of appeals (No. 72-2152) is reported at 487 F.2d 202 (1963).

The opinion of the district court is reported at 1972 Trade Cases, Par. 74,013, and is set out as Appendix "A" to this brief.[1]

[1]The appendix to this brief is hereinafter referred to as "BP APP A," with page number. The single appendix will be referred to simply as "APP." Petitioners' brief is referred to as "PET BR," with page number. The record is referred to as "R," with page number.

Jurisdiction.

The jurisdictional requisites are adequately set forth in petitioners' brief.

Questions Presented.

Interstate highways are part of the federal system of highways identified in Title 23, United States Code, Section 101, *et seq.*, and construction, maintenance, and repair thereof is authorized, regulated, and substantially financed by the United States. Two manufacturing procedures are required to produce asphaltic concrete which is used in the construction, maintenance, and repair of interstate highways. The first is the production of liquid asphalt which is one of the end products of refining crude oil which comes, substantially, from foreign and interstate sources. Liquid asphalt is commonly shipped across state lines.

The second procedure is the production of asphaltic concrete which is produced in a "hot plant" where the liquid asphalt and sand and gravel are combined into the finished product. Hot plant owners are customarily highway paving contractors who used asphaltic concrete in the construction, maintenance, and repair of interstate highways or sell asphaltic concrete for the same use.

Three of the petitioners refine and distribute liquid asphalt. Another of the petitioners distributes liquid asphalt and manufactures asphaltic concrete at fifty-five hot plants in California, Arizona, and Nevada, and uses asphaltic concrete, and sells that product for use, in the construction, maintenance, and repair of interstate highways. A fifth defendant below, whose rights will be directly affected by the decision herein, also manufactures asphaltic concrete at eleven hot plants

in Southern California and uses asphaltic concrete in the construction, maintenance, and repair of interstate highways. Respondents own a hot plant, manufacture and sell asphaltic concrete and use asphaltic concrete in the construction, maintenance, and repair of interstate highways, all in competition with petitioners. Respondents sued petitioners (and the fifth defendant) claiming violations of Sections 1 and 2 of the Sherman Act, Sections 3 and 7 of the Clayton Act and Section 13(a) of the Clayton Act, the 1936 amendment to that statute commonly known as the Robinson-Patman Act.

The district court held that it lacked jurisdiction under any of these statutes because asphaltic concrete was locally manufactured and locally applied. The court below reversed, holding that there was jurisdiction as respects alleged violations of each of these statutes upon the grounds that interstate highways are, classically, "instrumentalities of interstate commerce" and that interstate highway builders and contractors and suppliers and their sales of asphaltic concrete for that purpose, are "in commerce" because of the close relationship with such interstate commerce instrumentality. This Court denied the petition for certiorari addressed to jurisdiction under Sections 1 and 2 of the Sherman Act, but granted the petition as to the jurisdictional questions as respects the other three statutes.

The questions presented as to these remaining statutes therefore are as follows:

1. Is the jurisdictional requirement of Section 7 that the acquired corporation be a corporation "also engaged in commerce" satisfied as a matter of law when that acquired corporation:

(a) manufactures asphaltic concrete at eleven Southern California hot plants from asphalt refined and produced substantially from interstate and foreign crude oil;

(b) sells such asphaltic concrete for use, and uses, that product in the construction, repair and maintenance of interstate highways authorized, regulated and substantially financed by the United States.

2. Are the jurisdictional requirements of Section 3 of the Clayton Act that the seller, charged with unlawful tie-in practices, be a person "engaged in commerce" and that the prohibited practices are carried out "in the course of such commerce", satisfied as a matter of law where that seller:

(a) manufacturers asphaltic concrete at fifty-five hot plants located in Arizona, California and Nevada from liquid asphalt produced from substantial quantities of foreign and interstate oil, sells for use and uses asphaltic concrete for the construction, maintenance and repair of interstate highways authorized, regulated and substantially financed by the United States;

(b) engages in the prohibited tie-in practices in the course of selling asphaltic concrete for such interstate highway uses.

3. Are the jurisdictional requirements of Section 2(a) of the Clayton Act, as amended, commonly known and hereinafter referred to as the Robinson-Patman Act, that the seller is "engaged in commerce" and that the prohibited discriminatory sales are "in the course of," and "in," such commerce, satisfied where that seller:

(a) manufactures asphaltic concrete at fifty-five hot plants located in California, Arizona and Nevada from liquid asphalt refined from substantial quantities of foreign and interstate oil, sells for use, and itself uses, asphaltic concrete for the construction, maintenance and repair of interstate highways authorized, regulated and substantially financed by the United States;

(b) engages in the prohibited discrimination in sales of asphaltic concrete for such interstate highway use.

Constitutional Provisions and Statutes Involved.

Constitution, Article I, Section 8, Clause 3:

"The Congress shall have power * * * to regulate Commerce with Foreign Nations and among the several States * * *"

Sherman Act, Act of July 2, 1890, c. 647, §§ 1, 2:

"(1) Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

"(2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 730, as amended:

Section 1 (15 U.S.C. § 12):

"* * * 'Commerce', as used herein, means trade or commerce among the several States and with foreign nations * * * *."

Section 3 (15 U.S.C. § 14):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities * * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 4 (15 U.S.C. § 15):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees."

Section 7 (15 U.S.C. § 18):

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * * of any other corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. * * * *"

Section 2(a) (15 U.S.C. § 13(a)) Act June 19, 1936 adding Sections 13(a), 13(b) and 21(a) of Title 15 and amending Section 2 of the Clayton Act, commonly known as the Robinson-Patman Anti-Discrimination Act, c. 592, 49 Stat. 1526 (15 U.S.C. § 13, subd. (a)):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. * * * *"

Title 28, U.S.C. § 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Statement of the Case.

A. Basic Facts.

The respondents are Copp Paving Company, Inc., Copp Equipment Company, Inc., and Ernest A. Copp (hereinafter "COPP"). Copp operates a hot plant where it manufactures asphaltic concrete from hot liquid asphalt, aggregates and fillers. Copp sold asphaltic concrete to third parties (so-called "commercial sales") and also employed asphaltic concrete to construct, maintain and repair interstate highways.[2]

Petitioners Gulf Oil Company ("GULF"), Union Oil Company of California ("UNION") and Edgington Oil Company ("EDGINGTON") (hereinafter sometimes referred to as "the oil companies") purchased crude petroleum from foreign, interstate and local sources and operated refineries from which, among other things, liquid asphalt was produced.

(a) Gulf sold all of its liquid asphalt to petitioner, Industrial Asphalt, Inc. ("INDUSTRIAL"), Gulf's subsidiary, for further distribution in the form of liquid asphalt or for conversion by Industrial into asphaltic concrete. App. 105.

(b) Union sold its liquid asphalt to third parties in the western states, and it also supplied some of the liquid asphalt requirements of Sully-Miller Contracting Co. ("SULLY-MILLER"), Union's subsidiary, for conversion into asphaltic concrete. App. 99.

(c) Edgington sold its liquid asphalt in California and Nevada. In southern California it sold to Copp, Industrial and Sully-Miller among others. App. 86, 124-141.

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[2]Interstate highways are part of the federal system highways described in 23 U.S.C.A. § 101, *et seq.*

Petitioner, Industrial, purchased all of Gulf's supply of liquid asphalt, and together with supplies of liquid asphalt acquired from other suppliers, both inside and outside of California, distributed that liquid asphalt, in part, in a number of western states including California. Industrial also owned and operated fifty-five hot plants in California, Arizona and Nevada where it manufactured and sold asphaltic concrete to third parties in competition with Copp and others, and also employed asphaltic concrete in the construction, maintenance and repair of interstate highways, in competition with Copp and others. Gulf acquired all of the capital stock of Industrial. App. 105.

Sully-Miller, a wholly-owned corporate subsidiary of Union, purchased liquid asphalt from Union and from others, with the balance of Union's supply of liquid asphalt being distributed in the western states. Sully-Miller operates eleven hot plants in Southern California; manufactures asphaltic concrete either sold or used for constructing, maintaining, and repairing interstate highways. Union acquired all of the capital stock of Sully-Miller.[3] App. 181-182.

Both liquid asphalt and asphaltic concrete are used in connection with the construction, maintenance, surfacing, resurfacing, repairing, grading and paving of interstate roads and highways. It was also conceded below that the liquid asphalt market was an interstate market. However, petitioners contended that because asphaltic concrete, by its very nature, cannot be transported long distances for application to roads and highways, that fact conclusively established the asphaltic

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[3]Sully-Miller is not a petitioner here although this court's disposition of the case will directly affect it.

concrete market as a local market not subject to Section 1 or 2 of the Sherman Act, Section 3 or 7 of the Clayton Act, or the Robinson-Patman amendment to the Clayton Act.

B. Proceedings in the District Court.

Copp's complaint in the district court alleged, in essence, that the petitioners, and others, entered into a combination and conspiracy to restrain and monopolize the sale of liquid asphalt, the sale of asphaltic concrete, and the business of asphaltic paving of highways and roads, including particularly interstate and federal system highways, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), and that pursuant thereto, petitioners (and Sully-Miller) had ob- paving business in Southern California. (App. 55-58; Br. App. 6.) Copp alleged, under oath that the elements of this combination and conspiracy included, among other things, the following:

(a) The fixing of prices at which hot asphalt oil would be sold;

(b) The allocation of supplies of petroleum and petroleum products, including hot asphalt;

(c) The fixing of prices for the sale of asphaltic concrete;

(d) The acquiring of ownership and control of a substantial number of hot plants, including more than sixty percent (60%) of all of the hot plants operated in Southern California and in Los Angeles and Orange Counties;

(e) The allocation of customers as respects hot asphalt oil and asphaltic concrete;

(f) Threatening Copp's customers to cut off supply of asphaltic concrete in areas where Copp did not operate;

(g) Buying off and coercing Copp's customers not to do business with Copp;

(h) Tying the sale of other commodities so as to induce and require asphaltic concrete purchasers not to purchase from Copp in violation of Section 3 of the Clayton Act, 15 U.S.C. § 14;

(i) Selling hot asphalt oil and asphaltic concrete in such a manner as to discriminate in price between purchasers of such commodities of like grade and quality in violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13;

(j) Selling asphaltic concrete at unreasonably low prices and at below cost in the area where Copp competed and subsidizing those unreasonably low prices by artificially maintaining prices in other areas in which Copp did not compete;

(k) That Gulf acquired all of the capital stock of Industrial in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;

(l) That Union acquired all of the capital stock of Sully-Miller in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

The trial court invited separate consideration by motions for summary judgment of the asphaltic concrete elements of Copp's complaint. It was stipulated that all of the substantive allegations of Copp's complaint were to be admitted for the purpose of any motion for partial summary judgment addressed to the asphaltic concrete commerce issue (13 R 306). This stipula-

tion thereby *eliminated* the following substantive questions:

> (a) Whether, in fact, there was a combination or conspiracy in restraint of, or to monopolize any part of trade or commerce among the several states in violation of Section 1 or 2 of the Sherman Act;
>
> (b) Whether, in fact, the acquisition by Union of Sully-Miller or Gulf or Industrial "may be substantially to lessen competition or tend to create a monopoly" in violation of Section 7 of the Clayton Act;
>
> (c) Whether, in fact, the alleged tie-in practices existed and whether the effect thereof "may be to substantially lessen competition or tend to create a monopoly" in violation of Section 3 of the Clayton Act;
>
> (d) Whether, in fact, the effect of the alleged discretionary pricing practices "may be substantially to lessen competition or tend to create a monopoly in any line of commerce in violation of the Robinson-Patman Act."

Preliminary jurisdictional requirements, and *only* such jurisdictional requirements, of Sections 1 and 2 of the Sherman Act, Sections 3 and 7 of the Clayton Act, and the Robinson-Patman Act amendment to the Clayton Act were to be submitted for decision by motion for summary judgment upon the express stipulation that the allegations of the complaint as to all substantive violations of each of these statutes were true.

It is undisputed that asphaltic concrete sold by Industrial and Sully-Miller is produced from refining crude petroleum, including imported crude petroleum (App.

180-181). It was also admitted that Industrial owned fifty-five hot plants including a plant in Las Vegas-Henderson, Nevada, and a plant in Phoenix, Arizona (App. 180) and that Sully-Miller owns eleven hot plants, generally in Southern California (App. 182).

It was further admitted that from 1964 to 1970, Industrial's California plants made total asphaltic concrete sales ranging from 3,900,000 tons to 5,000,000 tons per year; its asphaltic concrete sales from its Phoenix plant ranged from 5,000 tons to 277,000 tons per year, and its asphaltic concrete sales from its plant at Las Vegas-Henderson were 21,000 tons in 1969 and 91,000 tons in 1970 (App. 180-181). Sully-Miller admitted that asphaltic concrete was used for constructing, maintaining, surfacing, resurfacing, and repairing roads and highways including federal interstate system highways and highways directly connected to interstate highways (App. 181).

Finally, when discovery by deposition was commenced by Copp on the asphaltic concrete jurisdictional issues, discovery as to dollars of sales and tonnage of asphaltic concrete involved in interstate highways was eliminated upon the submitted stipulation, accepted by the trial court, that "more than a de minimis quantity of the asphaltic concrete delivered by Copp and their competitors is delivered for use on interstate highways."[4] Br. App. A 3.

---

[4]This stipulation probably made it unnecessary to burden the record with statistics showing the dollar volume of asphaltic concrete produced and sold by Industrial or Sully-Miller or the dollar value of such sales for use in interstate highways.

The stipulation is in law that such sales for that purpose were substantial. Substantiality is also supported by the fact, sworn to by plaintiff and accepted by the trial court that In-

(This footnote is continued on next page)

It was also conceded that the interstate highway system and those who build it, supply it, and work on it are encompassed by and subject to the control and authority of the federal government. App. 179-180.

The trial court granted partial summary judgment to Gulf, United, Edington, and Industrial as to all of the asphaltic concrete issues in the case (leaving the remaining liquid asphalt issues to be tried) and full summary judgment in favor of Sully-Miller since, as the trial court stated, Sully-Miller was only engaged in the asphaltic concrete aspect of the business. Br. App. A. 8. It reasoned that as to the Sherman Act (a) asphaltic concrete was a locally produced product, locally applied, and (b) the alleged combination or conspiracy with respect to its use on interstate highways did not meet the Sherman Act's jurisdictional test. Br. App. A. 3-7.

The court also held, in effect, that since the Sherman Act jurisdictional test was not met, *a fortiori*, the jurisdictional requirements of Sections 3 and 7 of the Clayton Act and Section 2(a) of the Clayton Act, as amended (the Robinson-Patman Act), were not satisfied. Br. App. A. 7.

C. Proceedings in the Court of Appeals.

Copp was allowed an interlocutory appeal to the court below under Title 28, United States Code, Section 1292(b). That court reversed as to jurisdiction under all four statutes. It held that with respect to the Sherman Act it had long been established in this Court's decisions that Congress, in passing that statute, intended to exercise the full extent of its constitutional power under Article I, Section 8, Clause 3, of the Constitution. *United States v. Southeastern Underwriters Association*, 322 U.S. 533, 558-559 (1944). It further held that, as this Court's reading of Article I, Section 8 has expanded, so had its interpretation of the jurisdictional scope of the Sherman Act (402 F.2d 202, 204).

It further noted that the decisions in *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), *Alstate Construction v. Durkin*, 345 U.S. 13 (1953), and *Mitchell v. S. W. Vollmer & Co.*, 349 U.S. 427, 429 (1955) had established that for purposes of the Fair Labor Standards Act, Title 29, United States Code, Section 201, *et seq.*, vehicular roads were instrumentalities of interstate commerce, that persons repairing them were "engaged in commerce"; that those engaged in the local production of a road surfacing mixture for local use in an interstate highway were covered; and that the test was "whether the work is so directly and vitally related to the functioning of an instrumentality of interstate commerce as to be, in practical effect, a part of it rather than isolated local activity." Adhering to the application of those principles in *City of Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871 (5th Cir.), *cert. den.* 379 U.S. 900 (1964), the court below held that if highway builders and suppliers are "in commerce" because of their close relationship with an instrumentality of interstate commerce for labor relations purposes, they are in commerce for the regulation of price fixing and monopolization particularly

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dustrial and Sully-Miller together controlled seventy-five percent (75%) of the paving business in Southern California. Br. App. A 6.

Judicially noticeable facts establish that the federal aid highway systems in 1970 included approximately 10,000 primary and 15,000 secondary miles of highways in California (App. 169); that in 1970 in excess of approximately 10,000,000 motor vehicles entered California (App. 170); that in 1972 federal aid to California was in the amount of at least $394,000,000 (App. 173).

where the allegation and proof is as to activities involving the illegal manipulation of the very costs and products which put those same businesses "in" interstate commerce for purposes of the Fair Labor Standards Act (487 F.2d 202, 205).

The court below noted that Section 3 of the Clayton Act prohibited tie-in arrangements by "any person engaged in commerce"; that for jurisdiction under the Clayton Act, Section 7, both the "acquired" and the "acquiring" companies must be "in commerce" and that Robinson-Patman Act price discrimination jurisdiction required that the sales as well as the selling company be "in commerce." The court held that the fact that these Acts were intended to supplement the purpose and effect of the Sherman Act supported a uniform interpretation of the "in commerce" requirements present in all three statutes. Since the admitted facts established that Sully-Miller and Industrial were engaged in the construction, repair, and maintenance of interstate roads and highways and used and sold asphaltic concrete for that purpose, and that Industrial's tie-in practices were in the course of that business, *a fortiori*, the jurisdictional requirements of Sections 3 and 7 of the Clayton Act were thus established.

Similarly, Industrial's discriminatory sales of asphaltic concrete for use in interstate highways were thus clearly "in commerce" for the purposes the Robinson-Patman Act.

D. The Issues Before This Court.

This Court denied the petition for the writ insofar as it sought to reverse the decision of the court below that the district court had jurisdiction to hear Copp's claims of violation of the Sherman Act alleging restraints of

trade and monopolization in the sale of asphaltic concrete for use in interstate highways.

The issues now before this Court are:

1. Whether the anti-merger prohibitions of Clayton Act, Section 7, apply to Union's acquisition of the stock of Sully-Miller, a corporation engaged in the business of constructing, repairing interstate highways and using the selling asphaltic concrete for that purpose.

2. Whether the tie-in prohibitions of Clayton Act, Section 3, apply to Industrial's sales of asphaltic concrete for use in interstate highways;

3. Whether the prohibitions of the Robinson-Patman Act against price discrimination apply to Industrial's sales of asphaltic concrete for use in interstate highways.

Summary of the Argument.

I.

A single jurisdictional chain ties together the Constitution, Article I, Section 8, Clause 3, Sections 1 and 2 of the Sherman Act, and the Clayton Act, including the amendment to Section 2(a), the Robinson-Patman Act. The definition of congressional power over commerce in the Constitution is stated as follows:

> ". . . to regulate commerce among the several states and with foreign nations. . . ." (U.S. Const., Art. I, §8, cl. 3).

The Sherman Act, enacted in 1890, states that the restraints and monopolization which are prohibited are:

> ". . . of trade or commerce among the several states and with foreign nations." (15 U.S.C. §§ 1, 2).

Section 1 of the Clayton Act, adopted in 1914, states that for the purpose of that statute commerce is defined as:

> ". . . trade or commerce among the several states and with foreign nations. . . ." (15 U.S.C. § 12).

Thus, it is indisputable that insofar as congressional *language* is concerned, the statutory definitions of commerce in the Clayton Act and in the Sherman Act are the same, and each is as broad as the Constitution.

Thus when Congress in 1914 first prohibited the acquisition of any stock of a corporation "also engaged in commerce" (15 U.S.C. § 7) and when it prohibited tie-in sales by "any person engaged in commerce, in the course of such commerce," (15 U.S.C. § 3) the commerce to which each of those substantive statutes referred was the commerce defined in Section 1 of the Clayton Act, *i.e.*, "commerce aong the several states and with foreign nations."[5]

The jurisdictional commerce requirements of the price discrimination provision in the Clayton Act prior to amendment (October 15, 1914, c. 323, § 2, 38 Stat. 730) were tied to Section 1 of the Clayton Act set forth above. The Robinson-Patman Act amendments to the price discrimination provisions of the Clayton Act in 1936 (15 U.S.C. § 13(a)) did not include any modification of Section 1 of the Clayton Act. Thus the price discrimination under the Robinson-Patman Act which is prohibited to a "person engaged in commerce in the course of such commerce" when "one or more of the sales are made in commerce" still relates

[5]The Cellar-Kefauver amendment of Section 7 of the Act in 1950 did not alter the definition of commerce. (December 29, 1950, c. 1184, 64 Stat. 1125.)

back to the original commerce definition in Clayton Act Section 1, *i.e.*, "trade or commerce among the several states and with foreign nations."

The Sherman Act, Sections 3 and 7 of the Clayton Act, and the Robinson-Patman Act have goals which are common to each other. They are the "antitrust acts" which Congress has adopted with a common purpose to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations and to maintain the freedom of commerce in the United States.

This Court has held in *United States v. Southeastern Underwriters Association*, 322 U.S. 523, 558 (1944) that in enacting the Sherman Act Congress wanted to go to the utmost extent of its constitutional power. The Congress by the scope and the detail of its highway regulations and financing, and this Court by its unequivocal decisions, has made it unmistakable that interstate roads and highways are instrumentalities of interstate commerce and that in all activities connected therewith such instrumentalities are within the regulatory powers of Congress under the Constitution. The legislative history, the purpose, and the applicable law demonstrate that the regulation of competition and prevention of monopoly in the construction of interstate highways and in the supplying of materials which become a part of those interstate highways is within the regulatory power which was exercised, and intended to be exercised, by the Sherman Act, the Clayton Act, and the Robinson-Patman Act. At least as applied to interstate highways and federal jurisdiction, the meaning of "commerce" in the Clayton Act and the Robinson-Patman Act has the same reach as the Sherman Act.

II.

Relative to the Clayton Act, Section 7, the Anti-Merger Act: The jurisdictional requirements of that statute are that the acquiring corporation and the acquired corporation each be a "corporation engaged in commerce."

There is no dispute that Union is a corporation engaged in commerce by any test. Sully-Miller, as a paving contractor constructing interstate highways and as a supplier of asphaltic concrete for use in the construction of such interstate highways, is similarly "engaged in commerce among the several states . . ." Interstate highways are "instrumentalities of interstate commerce." Those who construct them and those who supply materials which are included in such interstate roads and highways are "engaged in commerce," and are subject to congressional regulation. *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943); *Alstate Construction v. Durkin*, 345 U.S. 13 (1953).

Since the stated purpose of Congress in adopting Section 7 of the Clayton Act was to prevent acquisitions where "the effect of such acquisition *may* be substantially to lessen competition . . .," Congress patently intended the broadest constitutionally permissible application of the anti-merger statute. It would be anomalous that acquisitions in a single state, or single state by single state, of potentially anti-competitive or dominant control of the interstate highway paving contractor business or of the supply of asphaltic concrete for that use would be beyond the jurisdiction of Section 7 of the Clayton Act merely for the reason that the asphaltic concrete does not physically move from state to state.

III.

Relative to Clayton Act Section 3: This statute prohibits tie-in sales where such sales are by a seller "engaged in commerce, in the course of such commerce." The basic facts applicable to Clayton Act Section 7 are equally applicable to Section 3.

Industrial, because it sells substantial quantities of asphaltic concrete for use in the construction, maintenance, and repair of interstate highways and engages in tie-in practices in the course of that business, falls within the jurisdictional reach of the statute. The link of these practices to interstate highways forms the nexus with "commerce among the several states," the defined meaning of commerce under Clayton Act Section 1. Since Congress, in adopting prohibitions against tie-in sales, attempted to cut off Sherman Act anti-competitive restraints "in their incipiency" where the effect "*may* be to substantially lessen competition," that statute patently calls for the application of the broadest constitutional meaning of "commerce" which is a jurisdictional reach coextensive with the Sherman Act.

IV.

Relative to the Robinson-Patman Act: The jurisdictional test for discriminatory sales under the 1936 amendment to Section 2 of the Clayton Act, known as the Robinson-Patman Act (15 U.S.C. § 13(a)), requires that the seller is "engaged in commerce" and "in the course of such commerce" discriminates in price "where either or any of the purchases involved in such discrimination is in commerce." Alleged discriminatory sales by Industrial of asphaltic concrete for use in the construction, maintenance, and repair of interstate highways again provides the statutory nexus with commerce

as it is defined in Section 1 of the Clayton Act for the purpose of jurisdiction.

The 1936 Robinson-Patman Act was adopted as an amendment to the 1914 Clayton Act. It did not change the definition of commerce contained in Section 1 of the Clayton Act. While the legislative history of the 1936 Robinson-Patman Act amendment is entwined with the interstate commerce aspects of the decision of this court in *Schechter Bros. Poultry v. United States*, 295 U.S. 495 (1935) and the subsequent reversal of that decision on the commerce issue in *Wickard v. Filburn*, 317 U.S. 111 (1942) it appears that here, again, the Congress intended that the jurisdiction of courts under the Robinson-Patman Act to hear claims of discriminatory pricing "in commerce" extend to the full meaning of that constitutional concept as declared by this Court.

Moore v. Mead's Fine Bread, 348 U.S. 115 (1954) precludes the argument that the jurisdictional requirements of the Robinson-Patman Act can be satisfied *only* by a sale which moves across state lines. Congress has the clear power to protect competition with respect to the construction, repair, and maintenance of interstate highways and the supplying of materials which are included in those highways, and there is no evidence that Congress intended to exclude instrumentalities of interstate commerce from the reach of any of its statutes which protect competition. There would appear to be no reason in legislative history or policy to preclude federal courts, as a matter of jurisdiction, from considering price discrimination in the sale of asphaltic concrete for use in interstate highways.

ARGUMENT.

I.

Federal Jurisdiction Over Interstate Highways as Instrumentalities of Commerce Is Complete and Pervasive.

Congress had indicated its intent to exercise the full scope of its powers, generally with respect to the interstate highways and specifically with respect to the encouragement and regulation of competition in the construction of that system.

A central fact which supports respondents' argument as to the application of all the antitrust statutes to the case at bar is the comprehensive federal interest in the interstate highway system and the expression of congressional intent that the federal government shall encourage full and free competition in the construction of that system.

The interstate highway system and those who build it, supply it, and work on it are encompassed by and subject to the control, authority, and financing of the federal government. Thus, the federal government contributes a portion of the cost of construction of all public highways. The basis of federal participation is the Federal Aid Highway Act (23 U.S.C. §§ 101-114). Under that Act, the federal government assumes approximately 90 percent of highway construction costs. To qualify for such aid, the states are required to establish standards for vehicle weight and width limitations (23 U.S.C. § 127), control outdoor advertising (23 U.S.C. § 135), create highway safety programs (23 U.S.C. § 135), and even control junk yards (23 U.S.C. § 136). Each project is subject to the inspection and approval of the Secretary of Transportation,

and was formerly under the control of the Secretary of Commerce. All wages paid for laborers and mechanics employed by contractors and subcontractors on roads funded by the Federal Act are controlled by the Davis-Bacon Act (23 U.S.C. § 113). In order to obtain aid, the state must create a highway department satisfactory to federal authorities (23 U.S.C. § 302).

The State of California has qualified for aid under the Federal Aid Highway Act, receives funds, and consents specifically to the application of the provisions of Title 23. In 1970, federal aid to the State of California for highways was in excess of $394,000,000. App. 173.[6] In 1970 in excess of approximately ten million motor vehicles entered the State of California from outside the state. App. 170.

It is this pervasive long-standing interest in a federal interstate highway system which has lead this Court to hold that interstate highways are "instrumentalities of interstate commerce." *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943). Moreover, Congress has not been silent with respect to its interest in the promotion and protection of competition in connection with the construction of the interstate highway system. Thus, the Congress stated:

> "It is declared to be in the national interest to encourage and develop the actual and potential capacity of small business and to utilize this important segment of our economy to the fullest practicable extent in construction of the Federal-aid highway systems, including the Interstate System. In order to carry out that intent, *and encourage full and free competition*, the Secretary should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway program. Pub. L. 85-767, Aug. 27, 1958, 72 Stat. 913." (23 U.S.C. § 304).

[6]Defendant Sully-Miller and defendant Industrial must comply with Executive Order No. 11246 dated September 24, 1965, in order to perform work on county roads funded under the Federal Aid Highway Act. App. 179, 180.

This statute also states:

> "The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, *participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract.*" (23 U.S.C. § 112(c)).

In the light of this pervasive federal interest and the recognition by Congress in the Federal Aid Highway Act of the need to protect and preserve competition in the construction of highways financed by federal funds, it would be anomalous indeed if the principal statutes which have been designed to protect and preserve competition were intended to be inapplicable. An analysis of the statutory history shows that this anomaly does not exist.

Petitioners state the issue as ". . . the question in cases like this is not how far Congress could go, but how far has it gone. . . ." Pet. Br. 14. It is respectfully

submitted, the specific intent of Congress to encourage the protection of competitive practices in the construction, maintenance, and repair of the interstate highways has been given statutory expression.

II.

The District Court Clearly Had Jurisdiction of the Acquisition by Union of the Capital Stock of Sully-Miller.

Since Union imports crude petroleum and distributes the products refined therefrom, including liquid asphalt, in many states, Union is clearly a corporation "engaged in commerce." There is no dispute as to this fact. It is conceded that Sully-Miller, the acquired corporation, owns eleven hot plants, principally in Southern California, from which it manufactures asphaltic concrete and uses that product in its interstate highway construction business and sells asphaltic concrete to others for the same purpose. While asphaltic concrete must be used within a fairly short radius from each hot plant, the interstate highway construction business of Sully-Miller and the use and sale of asphaltic concrete in those activities clearly falls within the jurisdictional commerce test of Section 7.

A. By Its Express Terms, the Jurisdictional Reach of Section 7 of the Clayton Act Is the Same as Sections 1 and 2 of the Sherman Act.

Clayton Act Section 7 requires that the acquiring and the acquired corporations be corporations "engaged in commerce" and, as we have noted, the commerce definition of Section 1 of the Clayton Act is the same as Sections 1 and 2 of the Sherman Act, and each statute mirrors Article I, Section 8, Clause 3 of the Constitution. As we have noted further, this Court has recognized that in enacting the Sherman Act, Congress "wanted to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements. . . ." *United States v. Southeastern Underwriters Association*, 322 U.S. 523, 558 (1944).

The court below has held expressly there was jurisdiction as to the asphaltic concrete issues of Copp's complaint under the Sherman Act, and this Court has denied certiorari as to that issue.

What was the intent of Congress in 1914 at the time it passed the Clayton Act, including the anti-merger provisions? The Senate Report stated that intent, as follows:

> "It is well, at the outset, to state the theory of the Bill both as it passed the House of Representatives and as it is proposed to be amended, for the general scope of the house measure is unchanged. It is not proposed by the Bill or amendments to alter, amend or change in any respect the original Sherman Antitrust Act of July 2, 1890. The purpose is only to supplement that Act and the other antitrust acts referred to in Section 1 of the Bill. Broadly stated, the Bill in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890 or other existing antitrust acts, and thus by making these practices illegal, to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation." (Senate Report No. 698, 63d Cong., 2nd Sess., 1914).

Indeed, there was an expansion of *territorial* jurisdiction of the Clayton Act over the Sherman Act as applied to insular possessions of the United States.

> "The definition of commerce, it will be observed, so as to include trade and commerce between any insular possessions or places under the jurisdiction of the United States, which at present do not come within the scope of the Sherman Anti-trust law or other laws relating to trusts." (House Report No. 627, 63d Cong., 2d Sess., p. 7).[7]

The Court of Appeals for the Third Circuit has recognized that when Congress originally enacted Section 7 of the Clayton Act in 1914 it intended that provision to have just as broad a reach as the Sherman Act. In *Transamerica v. Board of Governors*, 206 F.2d 163, 166 (3d Cir. 1953), the court said:

> ". . . The avowed purpose of the Clayton Act was to supplement the Sherman Act, 15 U.S.C.A. §§ 1-7, 15, by arresting in ther incipiency those acts and practices which might ripen into a violation of the latter act. Since the general language of the Sherman Act was designed by Congress 'to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements' the supplementary general language of the Clayton Act was undoubtedly intended to have the same all inclusive scope."

[7]The report also noted that Section 8, which became Section 7 ". . . is intended to eliminate this evil [the application of economic power through stock acquisition] so far as it is possible to do so. . . ." (*Id.* at 17).

In the petitioners' attempt to distinguish and avoid the unmistakable language of the *Transamerica* case, it is stated: "There it was sought to shrink the test of the Act from its natural coverage; here it is sought to expand it into a different kind of regulation." Pet. Br. 38. In the *Transamerica* case, it was conceded by Judge Maris in his opinion as being doubtless true that at the time of the passage of the Clayton Act in 1914 the Congress did not specifically contemplate banks as being in commerce. Nonetheless Judge Maris found that Section 7 of the Clayton Act did apply to prevent monopoly practices in the banking interest upon the rationale that the Sherman Act and the supplementary language of the Clayton Act used the fullest extent of constitutional power. Thus, although banks were not specifically intended to be covered when the Act was passed, the full use of power gave jurisdiction over the banking industry. The general intent of Congress to exercise the fullest extent of its constitutional power afforded jurisdiction over the banks although the Congress when it originally passed the Clayton Act did not have banks specifically contemplated. The implication of this rationale to the instant case is clear and unavoidable.

Petitioners argue that in *Transamerica* there was an attempt to *shrink* the Act (Clayton Act) from its natural coverage. What was the natural coverage of the Clayton Act? In the language of *Transamerica*, it was the same "all exclusive scope" as the Sherman Act, to wit, "the utmost extent of its Constitutional power in restraining trusts and monopoly agreements."

In *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-323 (1962), this Court reviewed the 1950 legisla-

tive history of the amendment to Section 7 and found that "[t]he dominant theme pervading congressional consideration . . . was a fear of what was considered to be a rising tide of economic concentration in the American economy." (*Id.* at 315). In addition, the legislative history reflected congressional concern over the "desirability of retaining 'local control' over industry and the protection of small business." (*Id.* at 315-316). Motivated by its concern over increasing concentration, Congress sought to give ". . . courts the power to brake this force at its outset and before it gathered momentum." (*Id.* at 317-318).

Certainly, no one can doubt that the deliberate acquisition of one hundred percent of the market for manufacturing and supplying asphaltic concrete, and control of interstate highway asphalt contractors in California, a result which patently could lead to monopoly prices in the construction and repair of interstate highways and the supplying of asphaltic concrete in connection therewith, would be a violation of Section 2 of the Sherman Act.

It would be a ludicrous defense to a Sherman Act proceeding, on those facts, to assert that asphaltic concrete does not move between states and therefore monopoly power over these interstate activities is not within the Sherman Act. That would be a mechanistic analysis of commerce and not the practical analysis which this Court has always required. *Overstreet v. North Shore Corp.*, 318 U.S. 125, 128 (1944).

If the acquisition of one hundred percent of the asphaltic concrete business in California would violate Section 2 of the Sherman Act, it is equally obvious that acquisitions which may lead to that result are precisely the intended object of Clayton Act Section 7.[8]

Petitioners have referred to and argued at length the appeal in *United States of America v. American Building Maintenance Industry*, No. 73-1689. In that case, involving the merger of maintenance companies which perform services for corporations engaged in interstate commerce, the United States argues that "engaged in commerce under Section 7 means engaged in activities in commerce or affecting commerce." We agree with this concept, although it is not necessary for the purposes of a decision of this case.

When Congress uses the term "commerce," and defines it in statutory language which mirrors the Constitution, that statutory language must be as broad as the Constitution. It would be facetious to deny that it is not aware of the fact that this Court's practical interpretation of "commerce" has changed and is changeable. "Commerce among the several states" means, constitutionally, activities in commerce or which affect commerce. (See the Shreveport Rate Cases, 234 U.S. 342 (1914).) The reach of Clayton Act Section 7 must embrace that meaning.

But in the instant case the construction of interstate highways and supplying of asphaltic concrete which

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[8]The distinction is not between "macroscopic and microscopic acquisitions". Pet. Br. 31. Interstate highways are instrumentalities of interstate commerce and *any* acquisition of a corporation that constructs interstate highways or supplies material which goes into such highways is so closely related to such instrumentalities as to be embraced by the jurisdictional test of "commerce" within the meaning of the antitrust laws.

becomes a part of those highways are each activities "in commerce" and the "affect" cases are not necessary to the decision here.[9]

Finally, petitioners argue the doctrine of federalism as a defense to the application of Clayton Act Section 7 to the acquisition of Sully-Miller. Who has the greater interest in the prevention of monopoly in the construction of interstate highways? Conceding a substantial state interest, can it be fairly stated that the federal interest is insubstantial? The fact that California has no anti-merger statute is a stronger, not weaker, argument in favor of the availability of the broadest possible protection of Section 7.

III.

Section 3 of the Clayton Act Was Applicable to the Tie-In Practices of Industrial.

The argument and authorities applicable to Section 7 of the Clayton Act are equally applicable to Section 3 of the Clayton Act. Industrial was also a corporation engaged in the business of manufacturing asphaltic concrete, using that product as part of its business to construct and repair interstate highways and, in addition, selling asphaltic concrete for the same purpose. Copp's allegation that tie-in practices were carried out in connection with Industrial's sales of asphaltic concrete are accepted as true for the purpose of this proceeding.

[9]Petitioners argue that if in 1914 Congress intended Clayton Act Section 7 to include corporations whose activities affected commerce, Congress could have included that phrase. But in 1914 this Court had not yet adopted the "affect" doctrine even as respects the Sherman Act. The failure of Congress to change the constitutional definition of commerce in the Clayton Act in 1950 when the Cellar-Kefauver amendment was adopted is evidence that Congress recognized that this constitutional definition would encompass this Court's expanding doctrine without any necessity for express supplementation.

The contention argued by petitioners is that the sale of asphaltic concrete for use in the construction and repair of interstate highways is not covered by the "commerce" definition of Section 1 of the Clayton Act. Since asphaltic concrete is a product which becomes a part of the interstate highway itself, the sale of that product for that purpose is, we submit, "commerce among the several states," upon the basis of the argument made earlier in this brief.

In *Alstate Construction v. Durkin*, 343 U.S. 13 (1953) this Court held that the production of amesite, which is the equivalent of asphaltic concrete, for use in interstate highways was "production of goods for commerce," and thus within the jurisdictional coverage of the Fair Labor Standards Act. By what reasoning can it be supposed that Congress intended that those employees who produce amesite or asphaltic concrete are subject to minimum wage protection but that sellers of that product who use tie-in practices to injure or eliminate competition are not covered by Section 1 and Section 3 of the Clayton Act?

As heretofore noted, congressional concern with the protection of competition as respects interstate highways in expressly stated (23 U.S.C. § 304). Certainly tie-in practices have been condemned by this Court as practices which have no other purpose other than the limitation of competition. *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958).

Thus, if the purpose of the Sherman Act is to prevent and punish elimination of competition, and the admitted purpose of the Clayton Act is to prevent these results "in their incipiency," the fundamental remedial purpose of the Clayton Act requires that the jurisdic-

tional commerce provisions be construed as broadly as the Sherman Act.

In *Standard Oil Co. & Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949), the United States charged that defendant, a California corporation, coerced its customers, automobile service stations, into accepting requirements contracts. The Court rejected the argument by the defendant that its deals with California service stations were beyond the reach of Section 3 since such dealings were intrastate, saying:

> "Appellant contends that its requirements contracts with California dealers, because nearly all the products sold to them are produced in California, do not substantially affect interstate commerce and therefore should have been exempted from the decree. . . . But the effect of appellant's requirements contracts with California retail dealers is to prevent them from dealing with suppliers from outside the State as well as within the State and is thus to lessen competition in both interstate and intrastate commerce. Appellant has not suggested that if these dealers were not bound by their contracts with it that they would continue to purchase only products originating within the State." 337 U.S. 293 (1949).

It should be noted that the basis upon which the Court found jurisdiction in *Standard Oil Co. & Standard Stations, Inc.* was that the intrastate sales in California by an interstate seller would *affect* the flow of interstate commerce into California. The significance of this holding is that it establishes, beyond doubt, that the term "commerce" in the Clayton Act embraces activities both in and affecting commerce and therefore has the same jurisdictional reach as the Sherman Act.

In the instant case, respondents submit that the sale of asphaltic concrete for use in interstate highways is "in commerce" and therefore embraced by Section 3 of the Clayton Act without consideration of the "affect on commerce" doctrine. Monopoly power over the market for the supply of asphaltic concrete for interstate highways show a clear threat that, when that monopoly power is attained, the prices of asphaltic concrete for interstate highways will be increased. An obvious result would be an increase in the cost of the construction of highways in California and it is not unlikely that this would decrease the number of miles of roads constructed in California.

Here, again, Congress adopted an incipiency statute, *i.e.*, to prevent a practice, tie-ins, which, if effective, would have the ultimate result of eliminating competition. It has been noted that there was no issue in the trial court on the non-jurisdictional question as to the affect, *in fact*, of the alleged tie-in practices. The only permissible question for purposes of jurisdiction is whether, if the "affect" doctrine is applicable, tie-in practices *might* affect the cost of interstate highways. That fact, *i.e.*, that it *might* affect the cost, was conceded. Br. App. A. 6.

Petitioner, anticipating respondents' reference to *Standard Oil Co. & Standard Stations, Inc., supra*, do not seriously dispute the fact that the decision stands for the proposition that the commerce test for a Section 3 violation is met by practices in commercial activities which may "affect" interstate commerce. They argue only that no such affect is possible here because interstate asphaltic concrete sales are not shown. This argument misses the point.

Monopolization—or tie-in practices by a substantial supplier of asphalt that could lead to such monopolization—may substantially affect the price for the construction of interstate highways. Thus, *Standard Oil Co. & Standard Stations, Inc. v. United States, supra,* is clear authority for the application of Section 3 of the Clayton Act to the instant case.

IV.

The Alleged Discriminatory Sales of Asphaltic Concrete by Industrial Were "in Commerce."

The Court is not asked to pass on the merits of respondents' contentions as to price discrimination or the affect of such alleged price discrimination. What is submitted is whether a federal court had the jurisdiction to decide whether price discriminations by a seller of asphaltic concrete for use in interstate highways could, by those discriminatory sales, violate the Robinson-Patman Act.

The Robinson-Patman Act requires a showing that the seller is engaged in commerce and in the course of such commerce makes discriminatory sales and that one of these sales is in commerce. On its face, a sale of asphaltic concrete for use in the construction of interstate highways would appear to be in commerce because the sale of the product relates directly to an instrumentality of interstate commerce.

But the argument is made that, particularly in Robinson-Patman Act cases, there must be at least one sale which moves across state lines.

The history of the anti-price discrimination statute is easily stated. Section 2 of the Clayton Act was adopted in 1914 and the reference to commerce there-

in was defined in Section 1 of the Clayton Act (15 U.S.C. § 12), *i.e.,* the constitutional definition. In 1936, Congress substantially amended Clayton Act Section 2 (15 U.S.C. § 13(a)). But the Robinson-Patman Act was an amendment—not a new statute. The definition of "commerce" in Section 1 of the Clayton Act, therefore, was untouched and is therefore the definition applicable to "commerce" in the Robinson-Patman Act.

It is also accepted that the Robinson-Patman Act amendment was intended to expand the application of the provisions against discrimination. Thus it was made clear by the Robinson-Patman Act amendment that if either the discriminatory sale or the sale to the plaintiff was in commerce, that satisfied the requirements of the statute and the earlier case law requirement that both sales be in commerce was eliminated. (Senate Report 1502, 74th Congress, 2nd Sess., 1936, p. 4.)

This amendment is not directly relevant to the instant case since, respondents submit, that *all* sales of asphaltic concrete for use in construction and repair of interstate highways are sales in commerce. But petitioners assert that Robinson-Patman Act decisions require explicitly that no sale is in commerce unless it crosses state lines. Thus, petitioners argue, there is no jurisdiction in a Robinson-Patman Act case unless one of the sales goes from state to state. That general rule is, of course, patently wrong.

In *Moore v. Mead's Fine Bread,* 348 U.S. 115 (1954), this Court, in an opinion written by Mr. Justice Douglas, reinstated a jury verdict in favor of a local baker who asserted that his competitor used profits

earned by sales at higher prices in another state to underwrite losses in competition against the plaintiff in the local state, that the use of funds generated by keeping bread prices high in one state while the local prices are lowered was prohibited by the Robinson-Patman Act.[10]

The lower courts appear to be uncertain in their understanding of *Moore v. Mead's Fine Bread, supra.*[11] In the cases cited in the petitioners' brief, pages 17-18 the so-called state line test has been reiterated. Not one of these cases involves the sale of a commodity for use in interstate highways and, therefore, they provide no direct authority for the application of the Robinson-Patman Act to the facts in this case.

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[10]The fact recited in the opinion, that some sales were made across state lines, was not the basis for the Court's decision.

[11]*Willard Dairy Corp. v. National Dairy Products Corp., cert. den.* 373 U.S. 934 (1963). There, Mr. Justice Black said:

> "Moreover, I think the result below is irreconcilable with this Court's decision in Moore v Mead's Fine Bread Co. 348 US 115, 99 L ed 145, 75 S Ct 148 (1954), in which we said that the Robinson-Patman Act condemns the monopolistic practice under which profits made in non-discriminatory interstate transactions are used to offset losses arising from discriminatory price-cutting at the local level. I believe that the Court of Appeals in the present case misconstrued both the statute and Moore when it held that respondent's interstate shipments 'from other than its Shelby, Ohio, plant' were wholly 'immaterial' to this case. Refusing to grant certiorari here means that this Court is allowing the economic resources and staying power of an interstate company to be used with impunity to destroy local competition, precisely the sort of thing the Robinson-Patman Act aimed to prevent. The present case presents an important question of price cutting by interstate business with local plants, each of which services largely a local area but all of which draw on the economic power of the national operation. Judgments like the one left standing here make it difficult indeed for small, independent, local companies to survive against the predatory assaults of their larger and more powerful interstate competitors. I would grant certiorari."

Here, the asphaltic concrete may not move from state to state, but the highways of which it is a part run throughout the United States.

Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23 (1824) provides ample authority that highways that run from state to state, like navigable rivers, are instrumentalities of interstate commerce. The sale of commodities which become part of those highways are therefore sales "in commerce."

V.

The True Intent of Congress in Adopting the Robinson-Patman Act, as Shown by Its Use of Language Drawn From the Constitution, Was to Exercise All of the Constitutional Power of Congress Which It Believed It Possessed. The Jurisdictional Test of the Robinson-Patman Act, Like the Jurisdictional Test of the Sherman Act and the Clayton Act, Broadens as This Court Broadens the Meaning of "Commerce."

An examination of the legislative history of the Robinson-Patman Act demonstrates two simple but obvious facts. They are:

1. The precise jurisdictional language was still drawn from the Constitution. The seller was required to be "engaged in commerce, in the course of such commerce," and discrimination in price was condemned only "where either of the purchases involved in such discrimination are in commerce." The term "commerce" was not defined again by Robinson-Patman because that statute was adopted as an amendment to the Clayton Act. The Clayton Act definition was that "commerce" meant "trade or commerce among the several states and with foreign nations . . . ."

2. The provision of Robinson-Patman that *at least* one of the discriminatory sales was required to be in commerce was not a limiting change but an expanding change. There had been prior decisions that, under old Section 2 of the Clayton Act, *both* of the discriminatory sales were required to be in commerce. (Senate Report No. 1502, 74th Congress, 2nd Session, page 4.)

It appears, however, that the Congressional view as to the scope and the meaning of "commerce" in 1936 was substantially colored by this Court's 1935 decision in *Schechter Bros. Poultry v. United States,* 295 U.S. 495 (1935). In that case, this Court held, as one of the grounds for its decision, that the National Industrial Recovery Act could not constitutionally cover the local sale of poultry even though ninety-five percent of that poultry came from outside the state. Such relationship was deemed to show an "indirect affect" only, and *Schechter* held that such "indirect affects" did not fall, constitutionally, within congressional power.

The *Schechter* case was decided only two weeks before Representative Patman introduced his original bill, and it made the language of that bill unconstitutional. There was congressional doubt about constitutionality of the provision, not a desire that the Robinson-Patman Act's commerce requirement be narrowly construed, that led to the elimination of the provision (See HR Report 2951, 74th Congress, 2nd Session (1936)).

Indeed, in the course of the revision of certain language which would have had an expanding effect on

jurisdiction, Congressman Utterbach stated: "This was omitted as the preceding language already covers all discriminations, both interstate and intrastate, that lie within the limits of federal authority." H.R. Report 2951, 74th Congress, 2nd Session (1936).[12]

But it is old teaching that this Court has, by its decisions, changed or expanded the meaning of the power of Congress, under the Constitution, over commerce.[13] Where Congress adopts a statute which employs that constitutional phrase as the jurisdictional test, it must contemplate that as the meaning of "commerce" is expanded the application of the statute may expand.

Two classic examples are the Sherman Act and the Clayton Act.

In *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219 (1949), Justice Rutledge reviewed in detail the history of the expansion in the application of the Sherman Act. Production or manufac-

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[13]Petitioners' brief makes no reference whatsoever to congressional history. The cases upon which they rely are similarly deficient in this respect. Reference is sometimes made to the remarks by Representative Mapes, that the Robinson-Patman Act would not apply to the sales of retail merchants, but this language must be understood in the light of the impact of *Schechter*. It does not denegrate from the use of constitutional language as the jurisdictional test nor the declared intent to exercise the full power of Congress.

[12]1. See the *Shreveport Cases,* 234 U.S. 342 (1914);

2. *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219 (1948);

3. *United States v. Southeastern Underwriters Ass'n.,* 322 U.S. 533, 546 (1944);

4. *Wickard v. Filburn,* 317 U.S. 111, 119 (1942);

5. *Heart of Atlanta Motel v. United States,* 379 U.S. 258 (1964).

turing in a single state was first excluded, and then included. Interstate distributing was first excluded then included within the Sherman Act coverage.

The doctrine of "indirect," "incidental" affects was first a limitation, and then the limitation was removed The Sherman Act stayed the same, the commerce language stayed the same, but the meaning of the word "commerce" in the Sherman Act was expanded.[14]

[14]"It is true that the first decision under the Sherman Act applied those mechanical distinctions with substantially nullifying effects for coverage both of the power and of the Act. [Citation.] Like this one, that case involved the refining and interstate distribution of sugar. But because the refining was done wholly within a single state, the case was held to be one involving 'primarily' only 'production' or 'manufacturing,' although the vast part of the sugar produced was sold and shipped interstate, and this was the main end of the enterprise. The interstate distributing phase, however, was regarded as being only 'incidentally,' 'indirectly,' or 'remotely' involved; and to be 'incidental,' 'indirect,' or 'remote' was to be, under the prevailing climate, beyond Congress' power to regulate, and hence outside the scope of the Sherman Act. See Wickard v. Filburn, supra (317 U.S. at 119 et seq., 87 L ed 131, 63 S Ct 82).

"The Knight decision made the statute a dead letter for more than a decade and, had its full force remained unmodified, the Act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products. Indeed, it and succeeding decisions, embracing the same artificially drawn lines, produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reversal.

"We do not stop to review again in detail the familiar story of the progression of decision to that end, perhaps not told elsewhere more succinctly or pertinently than in Wickard v. Filburn, supra. Suffice it to say that after coming back to life again in the Northern Securities Case, 193 US 197, 48 L ed 679, 24 S Ct 436, for matters of transportation, the Sherman Act had a second rebirth in 1911 with the decisions in Standard Oil Co. v. United States, 221 U.S. 1, 55 L ed 619, 31 S Ct 502, er LRA NS 834, Ann Cas 1912D 734, and United States v. American Tobacco Co. 221 US 106, 55 L ed 663, 31 S Ct 632. Cf. United States v. South-Eastern Underwriters Asso. 322 US 533, 553 et seq, 88 L ed 1440, 1457, 64 S Ct 1162.

"Not thereafter could it be foretold with assurance that application of the labels of 'production' and 'manufacture,' 'incidental' and 'indirect,' would throw protective covering over those processes against the Act's consequences. Very soon also came the Shreveport Rate Cases, 234 US 342, 58 L ed 1341, 34 S Ct 833, again in the field of transportation, but inevitably to add force and scope to the Standard Oil and American Tobacco rulings that manufacturing companies lay within the reach of the power and of the statute, deriving no immunity for their conduct violative of the prohibitions merely from the fact of engaging in that character of activity.

"With extension of the Shreveport influence to general application, it was necessary no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins, in order to decide whether Congress' commands were effective. For the essence of the affectation doctrine was that the exact location of this line made no difference, if the forbidden effects flowed across it to the injury of interstate commerce or to the hindrance or defeat of congressional policy regarding it.

"The formulation of the Shreveport doctrine was a great turning point in the construction of the commerce clause, comparable in this respect to the landmark of Cooley v. Port Wardens, 12 How (US) 299, 13 L ed 996. For, while the latter gave play for state power to work in the field of commerce, the former broke bonds confining Congress' power and made it an effective instrument for fulfilling its purpose. The Shreveport doctrine cut Congress loose from the haltering labels of 'production' and 'manufacturing' and gave it rein to reach those processes when they were used to defy its purposes regarding interstate trade and commerce. In doing so the decision substituted judgment as to practical impeding effects upon that commerce for rubrics concerning its boundaries as the basic criterion of effective congressional action." *Mandeville Is. Farms v. American C.S. Co.*, 334 U.S. 219, 229-233, 92 L.Ed. 1328, 1336-1338 (1948).

As we have noted, the "commerce" language of the Clayton Act was construed to cover banking, based upon contemporary decisions that banking was indeed commerce even though there was contrary teaching in 1914 when the Clayton Act was adopted (See *Transamerica v. Board of Governors*, 206 F.2d 163 and pp. 28 to 29, *supra*).

It is submitted that the Robinson-Patman Act must be construed to encompass the expanded interpretation of "commerce" which this court has given to the Sherman Act and the Clayton Act not only because Robinson-Patman is an amendment to the Clayton Act which adopts the Clayton Act definition of commerce, and not only because enforcement of Robinson-Patman in a jurisdictional sense should be equivalent with enforcement of the Clayton Act and the Sherman Act. The principal fact is that Congress, in adopting the constitutional test for jurisdiction in Robinson-Patman, intended the full application of its constitutional power, and there is no justification in history or logic to restrict the jurisdiction of the Federal Courts in applying that remedial statute to the commerce of the United States.

Conclusion.

The decision of the court below should be affirmed.

Respectfully submitted,

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APPENDIX A.

Order.

Original Filed May 31, 1972, Clerk, U.S. Dist. Court, San Francisco.

United States District Court, Northern District of California, Master File, No. 50173-RES, No. C-71-608-RES.

In Re Coordinated Pretrial Proceedings In Western Liquid Asphalt Cases.

This Document Relates to: Copp Paving Company, Inc., et al., Plaintiffs, v. Gulf Oil Corporation, et al., Defendants.

This is one of the Western Liquid Asphalt cases.[1] Plaintiffs seek damages and injunctive relief for anti-trust law violations alleged to have been committed by the defendants in the sale and marketing of liquid asphalt and asphaltic concrete. The complaint alleges in a first claim:

1. Price fixing and a monopoly in the sale and marketing of liquid asphalt and asphaltic concrete. 15 U.S.C. §§ 1 and 2.

2. Discrimination against plaintiffs by reason of price and credit concessions to some customers and sales to plaintiffs' competitors at unreasonably low prices. 15 U.S.C. § 13(a).

3. Unlawful exaction from customers of agreements not to use or deal in plaintiffs' products and services. 15 U.S.C. § 14.

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[1]Pursuant to 28 U.S.C. § 1407 the cases were transferred to the United States District Court for the Northern District of California for coordinated or consolidated pretrial proceedings. *See In re Western Liquid Asphalt*, 303 F.Supp. 1053 (J.P.M.L. 1969); *In re Western Liquid Asphalt*, 309 F.Supp. 157 (J.P.M.L. 1970).

4. Acquisition of stock, lessening competition and tending to create a monopoly. 15 U.S.C. § 18.

The second claim is substantially similar to the first except that it charges the violations under the California Cartwright Act (California Business and Professions Code § 16720).

Defendants by a series of motions seek to eliminate from this case the issues which are not common to the remainder of the Western Liquid Asphalt litigation. The court has heretofore stayed the discovery particular to this case and has ordered discovery to disclose the court's subject matter jurisdiction as to the asphaltic concrete issues.

I have assumed for the purposes of this order that the plaintiffs have proved all that they could as to the interstate character of their claim. In December 1971 it appeared to the court that there were potential jurisdictional problems which should be decided prior to the large-scale discovery on the merits which the plaintiffs proposed. The court ordered that discovery be directed to the jurisdictional problems, and plaintiffs made no request to enlarge the time allowed for that discovery. While in this day of notice pleadings and liberal discovery a plaintiff may initiate a case with no more than hope that his discovery will unearth something, I have acted on the premise that before parties should be required to submit to a burdensome discovery on the merits the facts supporting the jurisdiction of the court should be disclosed.

Liquid asphalt is a by-product of the refining of petroleum. It is extensively used in connection with the

construction and repairing of road and highway and other surfaces. Liquid asphalt does move in interstate commerce.

Asphaltic concrete is made by combining aggregates, fillers, and hot liquid asphalt in a hot plant operated at temperatures of approximately 375°F. The asphaltic concrete is discharged into a dump truck and delivered to the job, where it is placed at a temperature of about 275°F.

The traffic in asphaltic concrete is essentially local. The requirement that it be delivered hot plus the high costs of transportation as compared to the value of the product require that a hot plant serve a relatively restricted area. In this case plaintiffs' business was confined to an area near Los Angeles with a radius of 30 to 35 miles. None of the plants in competition with the plaintiffs delivered out of California. A more than de minimis quantity of the asphaltic concrete delivered by plaintiffs and their competitors is delivered for use on interstate highways.

While liquid asphalt moves in interstate commerce, the liquid asphalt used by plaintiffs and their competitors all comes from the State of California, which is an exporter of liquid asphalt. The aggregate used likewise are produced in California. The jurisdictional problem arises out of the fact that plaintiffs and plaintiffs' competitors manufacture a product out of California raw materials for sale and delivery in California.

The jurisdictional problem must be solved by examining the facts under the "in commerce" and the "affecting commerce" theories. *Yellow Cab Company of Nevada v. C. A. Christmas, et al.*, No. 25,567 (9th Cir. Mar. 1, 1972).

As indicated, asphaltic concrete does not move in interstate commerce except under exceptional circumstances, none of which are present here. Hence none of the acts charged to the defendants affect in any way the interstate movement of asphaltic concrete. Plaintiffs contend, however, that the use of the asphaltic concrete in the interstate highways puts it "in commerce" within the meaning of the Sherman Act. Plaintiffs point to the authorizing language in the Federal-Aid Highway Act (23 U.S.C. § 101(b)) which expressly relates the interstate highways to interstate commerce, to 23 U.S.C. § 113, which expressly subjects interstate projects to the terms of the Davis-Bacon Act (40 U.S.C.A. §§ 276(a) *et seq.*), to *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943) holding that vehicular roads are instrumentalities of interstate commerce and that persons repairing them are "engaged in commerce" within the scope of the Fair Labor Standards Act (29 U.S.C. §§ 201 *et seq.*), and to *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953), holding that persons locally employed producing amesite for local use in an interstate highway are engaged in the "production of goods for commerce" and for that reason are protected by Section 7(a) of the Fair Labor Standards Act (29 U.S.C.A. § 207(a)). The conclusion which plaintiffs draw from these authorities is that since interstate highways are in commerce parties supplying materials for the repair and construction of them are likewise in commerce and that there is jurisdiction under the Sherman Act.

Word meanings found in one legally regulated area may[2] or may not[3] be useful in determining the word

[2]*Overstreet v. North Shore Corp., supra.*

[3]*Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. 349 (1941).

meanings to be used in another. The Sherman Act forbids conspiracies "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. In providing guidelines for the interpretation of the Act courts have used the terms "in commerce" and "affecting commerce."

Both the language[4] of the decisions under the Sherman Act and the results reached by them indicate that the words "in commerce" are used in connection with local acts which do in fact affect in any degree the flow of interstate commerce. Thus in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the defendant's acts were designed to shut down a radio station doing an interstate business. In *United States v. Bensinger Company*, 430 F.2d 584 (8th Cir. 1970), the defendant conspired to fix the price of a single dishwasher which was itself in interstate commerce. In *Las Vegas Merchant Plumbers Ass'n v. United States, supra*, the evidence showed that as a result of the alleged conspiracy plumbers refused to work for a foreign plumber using imported fixtures.

On the other hand if the local act, though done in a business which is in interstate commerce, does not affect the flow of such commerce, then the "in commerce" theory is not satisfied. Thus in *Yellow Cab Company of Nevada v. C. A. Christmas, supra*, the court quoted with approval from *Page v. Work, supra*, as follows:

> The record is clear that appellee newspapers and Consolidated were engaged in interstate com-

[4]*Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1954), *rehearing denied*, 348 U.S. 889 (1954); *Page v. Work*, 290 F. 2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961); and *Yellow Cab Co. of Nevada v. C. A. Christmas, supra.*

merce by virtue of (1) their regular purchases of newsprint and other supplies from sources outside of California; (2) the dissemination of national news; (3) their carrying of national advertising; and (4) a few out-of-state subscribers.[5]

Yet, since the conspiracy related solely to local advertising, the court held that the defendant's activities did not affect the flow of commerce. I conclude that the plaintiffs' position cannot be maintained on the "in commerce" theory.

The question—Did the defendants' local activities substantially affect commerce?—remains.

Plaintiff Ernest Copp's affidavit is to the effect that Sully-Miller Contracting Company (Sully-Miller), a subsidiary of Union Oil Company of California (Union), and Industrial Asphalt, Inc., a subsidiary of Gulf Oil Corporation, together control 75% of the paving business in Southern California. It is claimed, and for the purposes of this order it is assumed, that Sully-Miller and Industrial Asphalt, Inc. are given preferential prices for liquid asphalt by their parent corporations which produce asphalt and that it is as a result of this competitive advantage that they have injured plaintiffs and gained for themselves a substantial corner on the paving market in Southern California.

Defendants' dealings in asphaltic concrete bear two possible relationships to restraints of interstate commerce. It is conceivable that a monopoly with respect

[5]It is noted that these activities are sufficient to put a newspaper in interstate commerce for the purpose of the National Labor Relations Act (*Associated Press v. N.L.R.B.*, 301 U.S. 103 (1937)), and the Fair Labor Standards Act (*Sun Publishing Co. v. Walling*, 140 F.2d 445 (6th Cir. 1944), and *McComb v. Dessau*, 89 F.Supp. 295 (S.D. Cal. 1950)).

to a product used in interstate highways could so increase the price of the product and the subsequent cost of the highways that fewer and poorer highways would be constructed and that interstate commerce could thus be affected. There is no evidence which gives any substance to this possibility. *Cf. Uniform Oil Co. v. Phillips Petroleum Co.*, 400 F.2d 267 (9th Cir. 1968).

As indicated, liquid asphalt does move in interstate commerce although the asphalt used by plaintiffs and defendants here was produced in California. It is possible as in *Las Vegas Merchant Plumbers Ass'n v. United States, supra*, that the agreement to divide an intrastate market for products moving in interstate commerce can affect commerce. It is sufficient here to say that plaintiffs do not suggest a theory (much less support it) by which a division of an intrastate market for asphaltic concrete produced from local liquid asphalt could affect the interstate market in liquid asphalt.

I conclude that the local activities of the defendants with regard to asphaltic concrete did not have a substantial impact on interstate commerce.

I conclude that the court should not, if it could, accept jurisdiction of the disputes as to the asphaltic concrete under the California law as pendent to the court's jurisdiction of the liquid asphalt claims. The issues differ not only because of the difference in the product involved but because of the difference in the nature of the cases. The case as to liquid asphalt is an action by a consumer seeking to recover damages caused by an alleged conspiracy to fix prices. To the extent that plaintiffs seek that relief their case remains. The issues raised as to the various methods of unfair competition practiced by the defendants in connection

with asphaltic concrete are not common to the liquid asphalt claims—they require a consideration of different facts and different laws. It is not in the interest of the expeditious treatment of these cases to add any extraneous issues to the massive and complex liquid asphalt litigation.

The defendant Sully-Miller neither produces nor markets liquid asphalt and does no interstate business of any kind.

IT IS THEREFORE ORDERED:

1. As to defendant Sully-Miller Contracting Company:

That there being no issue of material fact as to the defendant Sully-Miller Contracting Company its motion for summary judgment should be and is hereby granted and the plaintiffs are denied all relief.

2. As to the remaining defendants:

All discovery and further proceedings herein shall be limited to the following issues: (a) With respect to liquid asphalt whether said defendants, or any of them, violated 15 U.S.C. §§ 1, 2, 3, 13(a), 14 or 18, and if so (b) Whether and to what extent, if any, plaintiffs or any of them were injured in their businesses or properties by reason of said violations, if any.

3. No discovery or further proceedings shall be had herein with respect to any of the remaining claims herein asserted, *viz.*:

(a) Any claims that defendants, or any of them, violated 15 U.S.C. §§ 1 or 2 in connection with the marketing of asphaltic concrete;

(b) Any claims that defendants, or any of them, violated 15 U.S.C. § 13(a) in connection with the marketing of asphaltic concrete;

(c) Any claims that defendants, or any of them, violated 15 U.S.C. § 14, in connection with the marketing of asphaltic concrete;

(d) The claim that defendant Union Oil Company of California violated 15 U.S.C. § 18 by acquiring all the capital stock of defendant Sully-Miller Contracting Company;

(e) Any claims that defendants, or any of them, violated Section 16720 of the California Business and Professions Code with respect to asphaltic concrete.

I am of the opinion that the orders made herein and each of them involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from these orders may materially advance the ultimate termination of the litigation.

DATED this 29th day of May, 1972.

/s/ RUSSELL E. SMITH
United States District Judge

Service of the within and receipt of a copy thereof is hereby admitted this.....day of August, A.D. 1974.

_____

_____

Supreme Court, U. S.
FILED
OCT 7 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,
Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Brief for Petitioners Union Oil Company of California and Industrial Asphalt, Inc.

Two unrelated lines of argument run through Copp's (Respondents') brief,[1] and, although unrelated, they are not kept separate. The first is that sellers of asphaltic concrete, although wholly local, and sales of that substance, also wholly local, for use locally, are nevertheless "*in* commerce" because the substance is used in making or repairing roads. This is the reasoning of the court below. The second is not advanced by that court but is

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All emphasis in quotations in this brief has been added unless otherwise noted.

1. Hereinafter cited as "Resp. Br." Petitioners' opening brief will be referred to as "O.B."

urged by Copp, perhaps in apprehension that the reasoning below is untenable. It is that the provisions of the Robinson-Patman and Clayton Acts, despite the plain limitation of their language, should be read as if Congress has exercised all its constitutional power, as has been said of the Sherman Act, and therefore should be read as if their only jurisdictional requirement is that there be an *effect* on interstate or foreign commerce although neither party nor activity is "in commerce".

In their discussion of the specific statutes (Parts II through V of Resp. Br.) the reasoning of the court below is hardly more than alluded to; the bulk of the argument is devoted to the second line of reasoning.

Before answering Copp's argument, we observe that Copp does not dispute any of the facts set forth in our opening brief or add any new, true and relevant fact. There are some unwarranted but irrelevant innuendoes upon which we shall comment at appropriate places in the argument below. There is the incorrect assertion (Resp. Br. 11, 12) that petitioners stipulated that the allegations of the complaint about "effect" on interstate commerce were admitted for purposes of the motions for summary judgment. The incorrectness of that assertion is shown by the very record (13 R. 306) cited to support it.[2] As noted in our opening brief, the district court directed Copp to point to evidence of jurisdiction after it had completed its discovery, and the court, discharging its duty and exercising its power to find the facts bearing on jurisdiction, then *found* that there was no evidence of any effect on interstate commerce (See O.B. pp. 7, 8, 39, 40). The court below did *not* reverse that finding of fact, holding, instead, that there was "effect" as a matter of law. We do not discuss this matter further, because this Court has not brought before it the Sherman Act

2. The district court then stated the question as one left for it to decide (Pet. App. A, p. 3):

> "The question—Did defendants' local activities substantially affect commerce—remains."

issue where the controlling fact is "effect", and on the Robinson-Patman and Clayton Act issues the questions are whether more than effect is not required for jurisdiction.

ARGUMENT

I. The Use of Asphaltic Concrete in Roads Does Not Place the Seller or the Sale "in Commerce".

The term "interstate highway" is not a term of art. It was used in this case to signify roads for which federal financial aid is given to the States under the Federal-Aid Highway Act, 23 U.S.C. §§ 101, et seq. (72 Stat. 885, as amended). Such was the sense in which the term was used in the pleadings and in the stipulation on the subject (Appendix, pp. 17, 18, 27, 28, 181), and it is the sense in which Copp's brief uses it (e.g., Resp. Br. 2, fn. 2).

That very fact demonstrates the meaninglessness of the concept for this case. What the Federal-Aid Highway Act provides is for grants of money to the States to aid them in constructing roads. That aid is not confined to major routes. There are various classifications of roads, and the financial grant ranges down from 90% of the cost, depending on the classification. Federal aid is given to numerous things, such as forest roads and trails; to roads, streets and parkways within a state constituting a system of connected highways (Section 103(b)); to farm-to-market roads, local rural roads, county and township roads (Section 103(c)), as well as to an interstate system comprised of roads and streets so selected as to connect principal centers by routes as direct as possible (Section 103(d)). City streets are part of the interstate system. Thus Copp states (Resp. Br. 24, fn. 6) that Industrial and Sully-Miller must comply with a certain Executive Order "in order to perform work on *county* roads funded under the Federal Aid Highway Act."

The classification for which states receive the largest percentage of cost is the "interstate highway system". But roads in this classification are merely state roads one end of which connects at a state line with a road of another state in the most direct route between major cities. Included in the interstate highway system are "connectors" within a state. For example, the whole of Interstate 480 lies in San Francisco between the intersection of Broadway and Sansome Streets and the intersection of First and Harrison Streets. "Interstate 80" does not traverse Nevada; there are only disconnected stretches so labeled, alternating with stretches labeled "40" and not part of the interstate system.

The nature of federal highway aid and of what is aided is summed up in the regulations of the Secretary of Transportation, particularly 23 C.F.R. § 1.6(a) and (c), containing the following:

> "(a) *Selection or designation.* * * * systems of Federal-aid highways are selected or designated by any State that desires to avail itself through its State highway department, of the benefits of Federal aid for highways. Upon approval by the Administrator of the selections or designations by a State highway department, such highways shall become portions of the respective Federal-aid highway systems, and all Federal-aid apportionments shall be expended thereon.
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> (c) *Selection considerations.* Each Federal-aid system shall be so selected or designated as to promote the general welfare and the national and civil defense and to become the pattern for a long-range program of highway development to serve the major classes of highway traffic broadly identified as (1) interstate or interregional; (2) *city-to-city primary,* either interstate *or intrastate;* (3) *rural secondary or farm-to-market;* and (4) *intraurban.* The conservation and development of natural resources, the advancement of economic and social values, and the promotion of desirable land utilization, as well as the existing and potential highway traffic and other pertinent criteria are to be considered when selecting highways to be added to a Federal-aid system or when proposing revisions of a previously approved Federal-aid system."

State highways in California are designated by state statute (Cal. Streets and Highways Code, §§ 300, et seq.) and these designations are retained after federal aid.

Congress has *not* sought by the Federal-Aid Highway Act to regulate highways or the operations of those working on or supplying materials for use in highways, and it has not done so. What the Act does is to offer money to the States. It declares the conditions which must be met before money will be given, but a State willing to forego the gift can ignore the conditions. And no condition stated by Congress in the Act, including those referred to by Copp (Resp. Br. 24, 25), has any connection whatever with the Robinson-Patman Act or Sections 3 or 7 of the Clayton Act.[3]

Copp calls attention to the provision of Section 112(c) of 23 U.S.C. that in granting aid the Secretary of Transportation shall require as a condition precedent to his approval of contracts for construction of roads awarded by competitive bidding a sworn statement that the party to whom the contract is awarded has not "taken any action in restraint of free competitive bidding in connection with such contract." Instead of aiding Copp's case, this undermines it. If the fact that one constructing roads or supplying material to be used in their construction puts him and his activities "in commerce", then the whole body of federal antitrust regulation would automatically apply without more; the narrow regulation against restraint of competitive bidding in respect of the contract would already have been included

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3. The statement at Resp. Br. 14 that petitioners conceded "that the interstate highway system and those who build it, supply it, and work on it are encompassed by and subject to control and authority of the federal government" is not true. What was admitted is just what is stated above.

as a small part of the whole body of regulation, and it would have been unnecessary to enact Section 112(c) to impose but a small piece of the whole as a condition of federal aid.

Highway Statistics 1971, a publication of the U.S. Department of Transportation and the Federal Highway Administration,[4] notes that the federal-aid highway program is a "grant-in-aid type of program" (p. 93), and that numerous federal agencies share in federal-aid highway programs, including the Forest Service of the Department of Agriculture, the National Park Service, and the Department of Defense (p. 1). It states (p. 11) that:

> "Under the federal-aid highway program, initiative for selecting routes eligible for improvement with Federal-aid funds rests with the States, and these routes continue to remain under the jurisdiction of the States or local governments which are responsible for administering and maintaining them as part of the State or local highway systems."

And (pp. 185, 186):

> "Except for minor amounts of highway mileage, primarily in Federal parks and installations, practically all of the roads and streets in the United States are under the jurisdiction of the States and local governments. The Federal-aid systems are, basically, segments of State and local mileage eligible for Federal Aid. All highways in the Federal-aid systems are selected by the State and local governments, subject to the approval of the Federal Highway Administration."

There is no reason to suppose that the constitutional basis of the Federal-Aid Highway Act is the power to regulate commerce. Its provisions relate to military defense, national parks and forests, and the general welfare of the nation, and thus probably are supported by several provisions of the Constitution, primarily the "General Welfare" clause of Art. I, Sec. 8, Cl. 1 (*United States v. Butler*, 297 U.S. 1 (1936)). Whether the constitutional powers of Congress are such that it could impose its will on everything in any way connected with roads and road building is not a question in this case. Congress has not sought to do so.

4. U.S. Government Printing Office, Stock Number 5001-00047.

The Federal-Aid Highway Act offers no assistance at all in deciding the present case, nor did the court below suggest that it did. The fact of federal aid has no bearing on whether seller or sales are "in commerce". The only fact to be examined is the one on which the court below relied, viz., the fact that roads link up, one with another, and eventually a road crosses a state line. It is meaningless to the term "in commerce" whether a road is an "arterial," a "connector," a city street, or a farm-to-market road. There can be no logical division, whereby the reasoning of the court below applies to one kind of road and not another. That is why we said in our opening brief (p. 33):

> "Every street in every city, and every road anywhere in the nation, unless it connects with no other, is part of an interstate network of highways. Is therefore the seller of anything used in a street or road 'in commerce'? By that reasoning, the local society for care of the blind, selling their brooms to the street sweeper, or the street cleaner itself, or the little tow truck operator removing illegally parked cars from obstructing the street, all these are engaged 'in commerce'."

On May 31, 1974, in a decision not reported until after our opening brief was filed, the Fifth Circuit in *Scranton Construction Co. v. Litton Industries*, 494 F.2d 778, rejected the contention that the Robinson-Patman Act applies to local sales of readymix concrete used in the construction of a "shipyard, a massive instrumentality of interstate and foreign commerce" (p. 781), held that the lack of any sale crossing a state line is fatal, and then, *addressing itself to the very decision of the court below in the present case, said* (p. 781):

> "And though we recognize that the Supreme Court has granted certiorari in a second-line injury case where our Brethren of the Ninth Circuit have dispensed with the requirement of interstate sale on the ground that sales of a commodity to be used in constructing an instrumentality of interstate commerce were involved, and that thus a new deliverance in this area may soon come, we are not disposed to depart from our recent decision, supported by well-nigh universal precedent, that interstate sales must be involved for jurisdiction to attach under these acts."

The English language contains a body of terms, each of separate meaning and having an ascending order of reach, viz., "in commerce", "production of goods for commerce," production of or working on "instrumentalities of commerce," and "affecting commerce". They comprise an armory from which Congress can select the tool to achieve a particular purpose. To treat all these terms as synonymous is to corrupt language, and thereby the law, and thus to impoverish Congress. Yet that is what Copp asks the Court to do.

II. The Clayton and Robinson-Patman Acts, Unlike the Sherman Act, Do Not Exercise All the Power of Congress. More Is Required for Their Jurisdiction to Attach Than That Interstate Commerce Be Affected.

Copp's arguments about the specific statutes involved in this case do no more than note the rationale of the court below (e.g., Resp. Br. 36) and then pass on to urge and argue that the several acts are like the Sherman Act in requiring no more than an effect on interstate commerce.[5]

5. The questions on which the Court granted the writ present the Robinson-Patman Act, Section 3 of the Clayton Act, and Section 7 of the Clayton Act in that order, and they were discussed in that order in petitioners' opening brief. Our reply will follow the same order although respondents discuss them in reverse.

A. THERE WAS NO JURISDICTION OF THE ROBINSON-PATMAN CLAIM OF PRICE DISCRIMINATION.

Industrial makes asphaltic concrete entirely in California from California materials and sells it entirely in California, as does Copp.[6]

Copp's primary argument and its grand submission about Robinson-Patman (Resp. Br. 44) is that it, like the Sherman Act, must be construed as exercising all the powers the Constitution would allow Congress to exercise despite the plain limiting language of the statute. The thread of the argument is elusive.

Copp first asserts that the definition of "commerce" in the Robinson-Patman Act is the same as in Section 1 of the Clayton Act (Resp. Br. 36, 37) and in the Sherman Act (Resp. Br. 26). But that definition is merely shorthand that "commerce" means commerce between the states and with foreign countries. There is no issue in this case about the definition. Copp argues that decisions of this Court have expanded the meaning of "commerce". Any such expansion has been in respects not relevant here. There

6. Copp asserts (Resp. Br. 4) that Industrial "manufactures asphaltic concrete at fifty-five hot plants located in Arizona, California and Nevada . . . ." But 53 were in California and all 53 made and sold asphaltic concrete solely in California. There was 1 plant in Arizona, which made and sold asphaltic concrete solely in Arizona and there bought the liquid asphalt it used, and all hot plants with which it competed were located in the Phoenix area of Arizona. Similarly, the 1 plant in Nevada made and sold asphaltic concrete solely in Nevada and there bought the liquid asphalt it used, and all hot plants with which it competed were located in the Las Vegas area of Nevada (App. 117, and 2 R. 476, 477). The large number of plants shows how local the business is.

Copp also asserts that asphaltic concrete is made "from liquid asphalt produced from substantial quantities of foreign and interstate oil" (Resp. Br. 4). There is nothing to support the use of the adjective "substantial". It is a matter of judicial notice that asphalt is a product of the refining of crude oil, chiefly heavy crudes, and that heavy crudes are the typical California crude oil. Moreover, the source of the crude oil from which California refineries derive the asphalt which hot plant operators purchased to compound into asphaltic concrete is irrelevant. As noted at O.B. 6, asphaltic concrete is compounded of 95% rock, sand and aggregates and 5% liquid asphalt.

is no question here about when goods "come to rest"; no asphaltic concrete ever came from without a state or was destined to depart from a state. There is no question here about whether an activity is commerce or some other form of human activity, as was once held about insurance (*United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944)) and is still held about baseball (*Flood v. Kuhn*, 407 U.S. 258 (1972)). The decisions of the Court to which Copp really refers are not decisions expanding the meaning of "commerce" but expanding the reach of the constitutional grant of power to regulate commerce so as to permit regulation of what affects commerce even though the cause and the causers are not "in commerce". What Congress can do is different from what it does do. And in Robinson-Patman it has not chosen to regulate as broadly as perhaps it might.

The issue here concerns the requirement of the Robinson-Patman Act that the person making a discriminatory sale must be "engaged in commerce", that his conduct must be "in the course of such commerce", and that "either or any of the purchases" be "in commerce".

Copp argues (Resp. Br. 40) that the Act was written in terms narrower than the constitutional reach because "The *Schechter* case[7] was decided only two weeks before Representative Patman introduced his original bill" and that but for constitutional doubts raised by *Schechter* the Act would have been broader. This is pointless for a number of reasons. Where a statute is written in terms expressing regulation to the furthest reach of constitutional power, in the most comprehensive possible language, the reach of the statute will keep step with current views of the reach of the power. But where a statute is written with explicit restriction on its reach, courts cannot expunge those restrictions upon an assumption that Congress would have done so had it thought

7. *Schechter Bros. Poultry Co. v. United States*, 295 U.S. 495 (1935).

that it could. The Robinson-Patman Act has been on the books for nearly 40 years, with uniform interpretation, and Congress has not seen fit to rewrite it. Moreover, Congressman Patman has had no doubt of what his bill meant. In W. Patman, *Complete Guide to the Robinson-Patman Act* (Prentice-Hall, 1963), pp. 46-47, he wrote:

> "In those situations in which a person, partnership or corporation has been found to be engaged in commerce, discriminations practiced by him are not subject to the Robinson-Patman Act unless *some* of the different prices charged by him involve sales and shipments of goods across state lines. In other words, subsection 2(a) does not prohibit price discriminations which merely *affect* commerce. Some transactions must be *in* commerce, and not merely those which *affect* interstate commerce, since the Robinson-Patman Act only prohibits discriminations in price made in the course of commerce—that is, interstate commerce." [emphasis in original].

Furthermore, it is rankest speculation that the limitations of Robinson-Patman stemmed from apprehension about the scope of power as stated in the *Schechter* case. If it had been, and if constitutional doubts rather than "policy misgivings as to the wisdom of federal interventions in areas previously regulated by the states" (86 Harvard Law Rev. 765, 771) were the cause of the narrower scope of the Act, Congress would have pushed to the limits allowed by *Schechter* by tracking Schechter's language so as to prohibit discriminations "in or directly affecting commerce". In that way the reach of the Act would have accorded at any given time with judicial views of what directly affects commerce. Instead, Congress chose to impose the requirements that both the sale and the seller be "in commerce".

The requirement of "in commerce" was taken, not from *Schechter*, but from Section 2 of the Clayton Act enacted in

1914 (38 Stat. 730) and is the same as the requirement in Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(1) and (b), also enacted in 1914 (38 Stat. 719). In *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941) (discussed O.B. pp. 25, 26, 37 and 38) the Court, interpreting this very language in the Federal Trade Commission Act, declined to interpret it more broadly than it reads. Possibly to escape the force of *Bunte* decided in 1941, Copp asserts that the change in the Court's outlook about the scope of the commerce clause of the Constitution came with *Wickard v. Filburn*, 317 U.S. 111, in 1942 (Resp. Br. 22). On the contrary, it was in *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937) that the Court advanced from the outlook of the *Schechter* case, and the fundamentals of *Jones & Laughlin* were reaffirmed in *United States v. Darby*, 312 U.S. 100 (1941), which cites *Jones & Laughlin* (at p. 119) and in turn is cited in *Wickard v. Filburn*, 317 U.S. at p. 118. The *Bunte* case was decided just 14 days after *Darby* and thus plainly puts the quietus on the argument that the several acts imposing the requirement of "in commerce" are to be read as if they merely required an effect on commerce. Even after *Darby*, which showed that Congress could have gone farther than it did, the narrower question of what Congress had actually done in particular enactments continued to occupy the attention of the Court. *E.g., Kirschbaum v. Walling*, 316 U.S. 517 (1942); *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943); *Alstate Const. Co. v. Durkin*, 345 U.S. 13 (1953); *Mitchell v. Lublin, McGaughy & Asso.*, 358 U.S. 207 (1959). The Court's opinion in the latter case begins with this observation (358 U.S. at 211):

> "We start with the premise that Congress, by excluding from the Act's coverage employees whose activities merely 'affect commerce', indicated its intent not to make the scope of the Act co-extensive with its power to regulate commerce."

And by amendments in 1961 and 1966 Congress chose to exercise more of its power over wages and working conditions. (See fn. 10, O.B. 20).

Copp argues that the Robinson-Patman Act was intended to expand the provisions of Section 2 of the Clayton Act against discrimination. It did so, but in no respect relevant here. It had been held that Section 2 required both sales between which there was discrimination to be "in commerce". Robinson-Patman expanded the Act by requiring only one of the sales to be "in commerce," by the provision "when either or any of the purchases involved in such discrimination are in commerce". But the very fact that Robinson-Patman retained the requirement of "either or any" while eliminating the necessity that both be in commerce underscores the deliberate intention of Congress that *at least one of the sales* must be "in commerce". Until the decision below, all courts have held that this provision requires that at least one of the sales cross a state line. And, as just noted, the Fifth Circuit in *Scranton Construction Co., Inc. v. Litton Industries Leas. Corp.*, 494 F.2d 778 (1974), reasserted that requirement. It noted that in its decision here the court below had sought to distinguish prior decisions of the Fifth Circuit "on the ground that we were not there required to consider such a nexus," i.e., that "sales of a commodity to be used in constructing an instrumentality of interstate commerce were involved," and it nevertheless rejected the decision of the court below.[8]

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8. Copp cites an earlier decision of the same court, *City of Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871, cert. den. 379 U.S. 900 (1964). It obviously is limited to a Sherman Act situation and was not considered by the court that decided it to apply to Robinson-Patman and Clayton Act matters, as shown, not only by *Scranton*, but also by *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416 (5 Cir. 1972). We discussed the *Ft. Lauderdale* case in our petition for certiorari, but did not refer to it again in our opening brief since the writ was not granted with respect to the Sherman Act issue.

Copp's attempt to rewrite the Robinson-Patman Act by reference to "legislative history" must fail. Copp's argument was borrowed by it, without attribution, from a note by a second-year law student in 22 Hastings Law Journal 1225 (1971) and is answered by a note in 86 Harvard Law Review 765 (1973). The latter, characterizing the legislative history as "unrevealing," states (p. 772):

> "Against the background of such an unrevealing legislative history, the canon of statutory interpretation generally applied by the Supreme Court would seem to require adherence to the literal language of the statute."

In *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763, 767 (7 Cir. 1973), *cert. den.*, 414 U.S. 1146, rehearing denied, ... U.S. ....., 41 L.Ed.2d 1149 (1974), the Tenth Circuit quotes the following passage from p. 769 of the same Harvard Law Review note approvingly:

> "Nor does the complicated legislative history of the jurisdictional provisions of the Act lend much support to *Littlejohn's*[9] disregard of the statutory language. The Robinson-Patman Act as a whole was the product of such a complex series of interrelated legislative proposals that congressional intent is unusally difficult to decipher."

Copp's citation of *Moore v. Mead's Fine Bread*, 348 U.S. 115 (1954) and his criticism of lower courts' uniform interpretation of that case (Resp. Br. 22, 37, 38) are an irrelevant digression. In *Moore*, the defendant did sell its product across state lines, and there was discrimination in price between the local sales which injured the plaintiff and the interstate sales. The Court noted (348 U.S. at 118):

9. The *Littlejohn* decision here referred to was a decision of a panel of the Fifth Circuit which that court later set aside *en banc* in *Littlejohn v. Shell Oil Company*, 483 F.2d 1140, *cert. den.*, 414 U.S. 1116 (1973).

> "Respondent is engaged in commerce, selling bread both locally and interstate. In the course of such commerce, it made price discriminations, maintaining the price in *interstate* transactions while cutting the price in the *intrastate* sales." (Emphasis in original)

Whether, under *Moore*, it is enough that the profits from interstate sales offset losses from local sales or whether, as held in the *Mayer* and other cases, there must be some competitive relationship between the seller making the discriminations and another or between the local purchaser and the interstate purchasers or between the local sales and the interstate sales, is irrelevant to the present case. Here no sales to anyone crossed state lines.

B. THERE WAS NO JURISDICTION OF THE CLAIM UNDER SECTION 3 OF THE CLAYTON ACT

With respect to the Section 3 claim, which is that Industrial sold asphaltic concrete on condition that the buyer not purchase the product from respondents, the only relevant facts are that Industrial's sales were entirely in California, and any sales by Copp of asphaltic concrete would have also to be in California.

Citing *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953), Copp asks, rhetorically, how it can be supposed that Congress intended employees producing material for use in roads to be subject to minimum wage protection but that sellers of the product were not to be covered by Section 3 of the Clayton Act (Resp. Br. 33). The answer is simple: Congress expressed its wishes in quite different language in the two statutes. It chose to lay down different tests for application of the two Acts (all as shown at length in our Opening Brief at pp. 20, et seq.). The innumerable contending economic and social considerations pressing upon Congress for attention were different with respect to the two bodies of regulation, and Congress made its choice among them differently.

The basic vice in Copp's argument lies in overlooking the fact that Section 3 of the Clayton Act not only requires an *effect* on interstate commerce but also requires that the seller be "in commerce", that the tying practice be "in the course of that commerce," and that these requirements come first. Therefore Section 3 is "narrower" than the Sherman Act, the characterization given by the Court in *Standard Oil Company of California, et al. v. United States*, 337 U.S. 293 (1949) (at p. 297), where it also describes Section 3 as "narrowly directed" (p. 312). Citing the *Standard* case Copp in sweeping error says (Resp. Br. 29, 30): "Petitioner, anticipating respondents' reference to Standard Oil Co. & Standard Stations, Inc., supra, do not seriously dispute the fact that the [Standard] decision stands for the proposition that the commerce test for a Section 3 violation is met by practices in commercial activities which may 'affect' interstate commerce. They argue only that no such affect [sic] is possible here because interstate asphaltic concrete sales are not shown." The case does not stand for any such proposition. The fact that Standard *was* "in commerce", that it made numerous sales "in commerce", and that its imposition of exclusive dealing contracts was "in the course of such commerce" was a given datum and the starting point of the decision. Standard's argument was that the next requirement of the Act was absent, that because most of its sales were not interstate there was no substantial effect on interstate commerce, a further requirement of the Act. Thus the Court noted (at p. 297):

> "Obviously the contracts here at issue would be proscribed if § 3 stopped short of the qualifying clause beginning, 'where the effect of such lease, sale, or contract for sale' ".

The only issue presented in the case was that of "effect". In the present case, one never reaches the question of effect, because the hurdle of the first requirement, that the seller, the sales, and

the alleged tying arrangement must be "in commerce", must be cleared, and it is not.

This failure to observe that, while Section 3 does require an "effect" on interstate commerce, its first requirement is that the offender and the offense be "in commerce * * * in the course of such commerce", crops up in another argument. Copp asserts that a purpose of Section 3 of the Clayton Act, like Section 7, is to reach antitrust competitive restraints "in their incipiency" (Resp. Br. 21). From this premise Copp draws the *non-sequitur* that Section 3 has the same jurisdictional reach as the Sherman Act. The "incipiency" standard relates to "effect". The Sherman Act aims at effects on interstate commerce that are *actual, present, existing* and *adverse*. It was natural and understandable for Congress to exercise its full constitutional power to root out that kind of effect—one present and actual—however and by whomever worked, since the prohibitions are curative of a present evil. But the "incipiency" statutes relate, not to present actualities, but to prognostications about probabilities of the future; they are not curative of present evil but forestalling. It was entirely natural for Congress, and understandable, to conclude that regulation like that should operate only where the supposed offender and offense are "in commerce" itself.

The statutes plainly draw the distinction, they are differently worded, there is good reason for the difference, and there is no basis for courts to rewrite the statutes in order to ignore the difference.

C. THERE WAS NO JURISDICTION OF THE CLAIM UNDER THE CELLER-KEFAUVER ACT (CLAYTON ACT, § 7)

The plants of Sully-Miller, the acquired corporation, are entirely in California.[10] It sells no asphaltic concrete to anyone outside of California and operates only in California.

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10. Copp phrases the matter as "principally in Southern California" (Resp. Br. 26), thus leaving at odds the location of the others. They are all in Southern California, as is correctly stated at Resp. Br. 4. Copp's

Section 7 requires that the acquired corporation be "in commerce". To bring Sully-Miller within this requirement, Copp advances the two different lines of reasoning noted at the outset of this brief, but it flees from each for protection in the arms of the other. It begins and ends with a bare assertion, without argument, that the mere fact of highways placed Sully-Miller "in commerce" (Resp. Br. 26, 31), but the 5 pages in between are devoted to urging the second line of reasoning. Then, after devoting the bulk of its discussion to arguing that the words "engaged in commerce" mean no more than "engaged in activities affecting commerce", Copp retreats, saying that this conclusion "is not necessary for the purposes of the decision in this case" (Resp. Br. 31). If not, what less does Copp contend will suffice? Its very next paragraph asserts that " 'Commerce among the several states' means, constitutionally, activities in commerce or which affect commerce." Either that merely reasserts what Copp had just said was not necessary for its case, or else it means only that Congress has the constitutional power to regulate activities affecting commerce. If the latter is what is meant, the statement is true but irrelevant. The language of the Constitution is that Congress has the power "to *regulate* commerce with foreign Nations and among the several States and with the Indian Tribes" (Art. I, Sec. 8, Cl. 3). The term by which Congress chose to demark the extent of its regulation in Section 7 is "in commerce". And so, once again, the question is not what Congress could do but what it did do.

To support its primary contention that Section 7 is to be interpreted as requiring no more than an effect on commerce, Copp advances the same "incipiency" argument made concerning Section

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statement at Resp. Br. 4 that the asphaltic concrete manufactured by Sully-Miller is from asphalt produced "substantially" from interstate and foreign crude oil is shown, at p. 9, fn. 6, *supra*, to be both irrelevant and without support in the record.

3. Our discussion at p. 17, *supra*, answers the argument. Copp then (Resp. Br. 28) quotes from *Transamerica v. Board of Governors*, 206 F.2d 163, 166 (3 Cir. 1953). In our opening brief (at p. 38) we noted that the quotation, read in context, did not conceivably mean that Section 7's requirement that the acquired corporation be "in commerce" was to be ignored or to be interpreted as meaning "affecting commerce". In the *Transamerica* case the court made the quoted utterance in connection with rejecting an argument that the words "corporations engaged in commerce" did not include banks. Section 7 speaks comprehensively of "corporations engaged in commerce"; banking corporations are engaged in commerce, and therefore the natural meaning of the section includes banks.

Copp then poses a supposititious case, that someone acquires 100% of the manufacture and supply of asphaltic concrete and highway asphalt contracting. It would be, Copp proclaims, "a ludicrous defense to a Sherman Act proceeding, on those facts, to assert that asphaltic concrete does not move between states and therefore monopoly powers over these interstate activities is not within the Sherman Act" (Resp. Br. 30). However ludicrous such an assertion might be, the supposititious situation is not relevant. The statute under consideration here is *not* the Sherman Act, which requires no more for jurisdiction than the designated effect on commerce.

The requirements of Section 7 are both more and less stringent than those of the Sherman Act. Under Section 7 the "effect" need not be as stringent—for it need only be incipient rather than actual—but Section 7 does not apply at all unless both acquired and acquiring corporations are "in commerce". The leniency of Section 7 with respect to "effect" is matched by its rigor with respect to when Section 7 applies. Congress was not unmindful that it was not going as far as it constitutionally could. For example,

when Section 7 was enacted in 1914 (38 Stat. 731), it permitted *effect* to be measured "in any * * * community." In 1950, at the time the Celler-Kefauver amendments were introduced, that language was again proposed, but it was rejected for reasons stated in Senate Report No. 1775, 81st Congress, 2d Sess. (1950), p. 4, as follows:

> "As the bill originally stood, it was to be violated if, among other things, competition was substantially lessened '* * * in any community * * *' of the country. The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise from buying up another local enterprise in the same town. As a consequence, the word 'community' was dropped from subsequent versions of the bill."

CONCLUSION

Numerous social, economic and political considerations contest with each other for the attention of Congress when it considers what legislation to enact and whether to exercise the full range of its powers. Congress has a choice of apt terms to express how far it chooses to go in regulating commerce in response to these contending claims. In the Robinson-Patman and Clayton Acts it has chosen its terms with circumspection. Courts should not expand them.

The court below erred in its decision of each of the matters on which the writ was granted. We respectfully submit that its judgment should be reversed and that of the district court reinstated on these matters.

Dated: San Francisco, California, October 4, 1974.

Respectfully submitted,

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No. 73-1012

In the Supreme Court of the United States

OCTOBER TERM, 1974

GULF OIL CORPORATION, ET AL., PETITIONERS

v.

COPP PAVING COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 487 F. 2d 202. The opinion of the district court (Pet. App. A) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1973. The petition for a writ of certiorari was filed on December 28, 1973, and granted on March 25, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The United States will discuss the following question:

Whether the word "commerce" in the phrases "engaged in commerce" and "in the course of such commerce" in Sections 3 and 7 of the Clayton Act includes local activities which substantially affect interstate commerce.

STATUTES INVOLVED

The pertinent statutory provisions involved are set forth at pp. 3–5 of the petitioners' brief on the merits.

INTEREST OF THE UNITED STATES

This case involves the application of Sections 3 and 7 of the Clayton Act, which prohibit certain exclusive dealing agreements and certain stock and asset acquisitions, respectively, to transactions involving firms which, although not themselves directly engaged in interstate commerce, provide products and services for firms that are engaged in such commerce. Two agencies of the United States, the Department of Justice and the Federal Trade Commission, have concurrent jurisdiction to enforce those provisions (see *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 694–695). There is pending before the Court a direct appeal by the United States from a district court judgment dismissing its civil suit challenging, under Section 7 of the Clayton Act, the acquisition of a firm not operating in the flow of interstate commerce but which performs services for firms that operate in

interstate commerce. *United States* v. *American Building Maintenance Industries*, No. 73–1689.

The decision of this Court in this private suit, presenting important questions concerning the reach of Sections 3 and 7 of the Clayton Act, will not only generally affect the government's enforcement of those sections, but is likely to have a significant impact upon the government's appeal in the *American Building* case.

Since the United States is concerned solely with the interpretation of the "commerce" requirements of Sections 3 and 7 of the Clayton Act, we express no views as to whether the transactions involved in this case are encompassed by Sections 3 and 7 as properly applied.

STATEMENT

A. THE PROCEEDINGS

The amended complaint in this civil antitrust suit, filed in the United States District Court for the Central District of California by respondents Copp Paving Company, Inc. ("Copp"), Copp Equipment Company, Inc., and Ernest A. Copp, against Gulf Oil Corporation ("Gulf"), Union Oil Company of California ("Union"), Edgington Oil Company ("Edgington"), Industrial Asphalt, Inc. ("Industrial"), and Sully-Miller Contracting Company ("Sully-Miller") (App. 13–24), alleged that the defendants violated Sections 1 and 2 of the Sherman Act, Section 2(a) of the Robinson-Patman Act, and Section 3 of the Clayton Act, 15 U.S.C. 14, in connection with the sale of liquid asphalt and asphaltic concrete (App.

13–24). The complaint also alleged that Gulf violated Section 7 of the Clayton Act by acquiring all the capital stock of Industrial and that Union violated Section 7 by acquiring Sully-Miller (App. 21).

The defendants moved for summary judgment in favor of Sully-Miller and to limit the issues as to the other defendants (App. 144–145). In response to that motion, the district court dismissed all claims against Sully-Miller and all claims against the other defendants under the Sherman Act, the Robinson-Patman Act and Section 3 of the Clayton Act involving the marketing of asphaltic concrete. It did not dismiss the claims under those provisions involving the marketing of liquid asphalt. The court also dismissed the Section 7 claim based on Union's acquisition of Sully-Miller, but not the Section 7 claim based on Gulf's acquisition of Industrial (Pet. App. 1–8).

On an interlocutory appeal, the Court of Appeals for the Ninth Circuit reversed the district court's partial summary judgment in favor of the defendants other than Sully-Miller, and reserved the judgment with respect to the final summary judgment in favor of Sully-Miller (Pet. App. 15).

B. THE COMPANIES INVOLVED

Gulf, Union and Edgington are petroleum refiners. They produce and sell a variety of petroleum products, including liquid asphalt. Union and Edgington produce liquid asphalt at refineries in California, which they sell in other western states (App. 72, 139). Gulf produces liquid asphalt at its Los Angeles refinery which it sells to Industrial, its wholly owned

subsidiary. Industrial apparently sells liquid asphalt purchased in California in other western states (App. 122–123). Union, Edgington, and Gulf are not directly engaged in the production of asphaltic concrete.

Copp, Industrial and Sully-Miller all produce asphaltic concrete (App. 51, 86–87, 117). Although the description of their business activities in the record and the opinions below is somewhat ambiguous, all three companies apparently are themselves paving contractors and also sell asphaltic concrete to other paving contractors (App. 51, 86–87, 117). Industrial also sells liquid asphalt (App. 122–123); Copp and Sully-Miller do not (App. 87).

Asphaltic concrete is produced at "hot plants" by combining liquid asphalt with aggregates and fillers at temperatures of approximately 375° F. It is delivered to the jobsites in dumptrucks and is placed at a temperature of about 275° F. The nature of the product limits deliveries to an area within about 35 miles of the hot plant (Pet. App. 3).

Copp operates one hot plant at Artesia, California, and its operations are largely confined to the Southern half of Los Angeles County (App. 53). Sully-Miller operates 11 hot plants in Los Angeles and Orange Counties (App. 90). Industrial apparently operates 55 hot plants in California, Arizona and Nevada (App. 180). Sully-Miller and Industrial both compete with Copp for asphaltic concrete business in the Los Angeles area (App. 87, 130).

The present location of the Copp and Sully-Miller hot plants precludes either company from delivering asphaltic concrete outside of the state of California

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(App. 53, 90). Although Industrial's Nevada hot plant is apparently located within 35 miles of the Nevada-Arizona border and may be capable of producing asphaltic concrete for delivery in California, Industrial has stated, apparently without contradiction: "At no time has any of the asphaltic concrete produced at any of the hot plants owned and operated by Industrial in either California, Arizona or Nevada been sold or shipped outside the states in which the plants were located" (App. 117).[1]

C. THE SECTIONS 3 AND 7 CLAYTON ACT CLAIMS INVOLVED

1. *The Section 3 Claims.* The questions before this Court with respect to claims under Section 3 of the Clayton Act are limited to claims based on alleged Section 3 violations by Industrial in connection with the sale of asphaltic concrete. Section 3 prohibits sales or leases "on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller * * *," which have anticompetitive effects. Paragraph 19(h) of the amended complaint alleges that the defendants "[t]hreatened actual and potential customers of plaintiffs that unless they refrained from purchasing asphaltic concrete from plaintiffs in plaintiffs' area of competition, that said customers would be unable to obtain supplies of asphaltic concrete at a competitive price in

[1] Industrial has acknowledged that it is engaged in interstate commerce in some of its operations (A. 118). It apparently purchases liquid asphalt in California which it resells in other states (A. 122-123).

other areas where said customers had no other source of supply other than defendants" (App. 20). This allegation apparently encompasses asphaltic concrete sales both in the Los Angeles area and at other unspecified locations, which were conditioned on the customers refraining from purchasing the product from Copp for use in the Los Angeles area.

2. *The Section 7 Claim.* Since the district court did not dismiss the respondents' claim based on the Gulf acquisition or Industrial, the only question before this Court with respect to Section 7 of the Clayton Act involves the allegation that Union violated that section by acquiring Sully-Miller. Section 7 prohibits certain acquisitions by a corporation "engaged in commerce" of the assets or stock "of another corporation engaged also in commerce * * *," which have anticompetitive effects.

D. THE OPINIONS BELOW

Neither the district court nor the court of appeals focused upon the specific language of Sections 3 and 7 of the Clayton Act defining the reach of the statute in relation to commerce. Instead, the district court concluded that the asphaltic concrete marketing activities of Industrial and Sully-Miller do not constitute commerce within the prohibition in Section 1 of the Sherman Act against conspiracies, combinations and contracts in restraint of "commerce" and then assumed that activities which do not constitute commerce under the Sherman Act similarly are not commerce under the Clayton Act. In reversing the dismissal of the Section 3 and Section 7 portions of the

complaint, the court of appeals noted that asphaltic concrete produced by Copp, Sully-Miller, and Industrial is used in the construction of interstate highways and held that "the production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law" (Pet. App. 10).

ARGUMENT

Introduction and Summary

Statutory language delineating the reach of legislation regulating commerce requires particularized analysis. The words "commerce," "in commerce," and "interstate commerce," do not have a fixed meaning uniformly applicable whenever such words appear in statutory provisions. Rather, this Court stated in *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 520–521:

> The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration.

The language, history and purpose of the Clayton Act demonstrate that in that Act Congress intended to exercise the full extent of its constitutional power to regulate commerce. Thus, the term "commerce" as used in that Act encompasses all activities properly

subject to federal regulation under the Commerce Power, *i.e.*, not only activities which are directly interstate in character but intrastate activities which have a substantial effect on interstate commerce.

The phrase "engaged in commerce," which appears in both Section 3 and Section 7, should be interpreted to mean engaged in commercial activities which are subject to congressional power. In the Sherman Act, Congress exercised to the utmost extent the federal power to regulate commerce. See *United States* v. *South-Eastern Underwriters Assoc.*, 322 U.S. 533. The draftsmen of the Clayton Act, who sought to extend the substantive prohibitions of the Sherman Act, did not intend the new legislation to have a narrower reach with respect to commerce than the earlier statute they were attempting to strengthen.

Although more recent cases, and some statutes, differentiate between activities which are in the flow of interstate commerce and intrastate activities which affect that commerce, that distinction should not be read into "engaged in commerce," which was used in the original Clayton Act in 1914. Nor should the meaning of this phrase in Section 7 be limited as a result of the 1950 amendments of that section. The 1950 Congress never focused on that phrase, and did not intend to constrict its meaning and scope.

Similarly, the phrase "in the course of such commerce" in Section 3 of the Clayton Act should be interpreted to mean in the course of activities which are subject to federal regulation. That interpretation is consistent with the purpose of and with past deci-

sions applying Section 3. The phrase was added to the statute to exclude coverage of activities which are not subject to federal regulation because they are inherently local and do not affect interstate commerce. Section 3 has been applied to prohibit exclusive dealing arrangements in connection with intrastate sales.

In Enacting The Clayton Act Congress Intended To Regulate Both Interstate Activities and Local Activities Having a Substantial Effect on Interstate Commerce

A. SECTION 7 APPLIES TO FIRMS ENGAGED IN LOCAL ACTIVITIES THAT SUBSTANTIALLY AFFECT COMMERCE

1. Section 7 of the Clayton Act prohibits mergers or acquisitions which may have anticompetitive effects where both the acquired and acquiring firms are "engaged in commerce". The meaning of the phrase "engaged in commerce" is primarily derived from the definition of "commerce" in the Clayton Act and its legislative history.

Section 1 of the Clayton Act defines "commerce" as follows:

> "Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.

This definition, which appeared in the original bill reported by the House Judiciary Committee in 1914,[2] used almost the precise words—"trade or commerce among the several States and with foreign nations"—which had been used in the Sherman Act.[3] It also broadened the definition to encompass commerce between insular possessions and territories. The legislative history of the Clayton Act confirms that by this broad definition of "commerce" Congress intended that the Clayton Act would reach all commerce to which the Sherman Act was applicable.

As the official title of the Clayton Act ("An Act to supplement existing laws against unlawful restraints and monopolies * * *," 38 Stat. 730) implies, Congress intended to extend the proscriptions of the antitrust laws to transactions and trade practices not covered by the Sherman Act. The Senate Report declared that the objective of the Act was (S. Rep. No. 698, 63d Cong., 2d Sess., 1):

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[2] The Senate added a proviso, "That nothing in this Act contained shall apply to the Philippine Islands." S. Rep. No. 698, 63d Cong., 2d Sess., 42-43. The definition section as amended has remained intact as 15 U.S.C. 12.

[3] Section 1 of the Sherman Act, 15 U.S.C. 1, declares that every contract, combination or conspiracy "in restraint of trade or commerce among the several States, or with foreign nations" is illegal, and Section 2, 15 U.S.C. 2, declares that persons who monopolize "any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

> * * * to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the [Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation. * * *

The arresting of the creation of trusts or monopolies in their incipiency was the fundamental principle underlying Section 8 of the Clayton bill (now Section 7 of the Act) and the House Report stated that that section was intended to eliminate the evil resulting from the aggregation of economic power through stock acquisitions "so far as it is possible to do so." See H. Rep. No. 627, 63d Cong., 2d Sess., 17.

This Court discussed the purposes of Section 7 as it read prior to the 1950 amendments in *United States* v. *E. I. DuPont De Nemours & Co.*, 353 U.S. 586, and observed (353 U.S. at 589):

> Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended.

The Clayton Act was a remedial statute designed to reach anticompetitive practices in their incipiency. It would have been anomalous for Congress to have sought to strengthen the antitrust laws by curing perceived deficiencies in the Sherman Act and at the same time to have restricted the jurisdictional scope of those remedial provisions. The Court of Appeals for the Third Circuit recognized this fact, in *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, certiorari denied, 346 U.S. 901, in holding that banking constituted "commerce" for purposes of the Clayton Act. Thus, the court stated (206 F. 2d at 166):

> We find nothing in the legislative history, however, to indicate that Congress did not intend by Section 7 to exercise its power under the commerce clause of the Constitution to the fullest extent. The avowed purpose of the Clayton Act was to supplement the Sherman Act, 15 U.S.C.A. §§ 1–7, 15 note, by arresting in their incipiency those acts and practices which might ripen into a violation of the latter act. Since the general language of the Sherman Act was designed by Congress "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements" the supplementary general language of the Clayton Act was undoubtedly intended to have the same all inclusive scope.

This conclusion is further supported by the 1950 amendments to the Clayton Act, which extended Section 7 to cover the acquisition of assets. Although the legislative history of the 1950 amendments did not deal directly with the "commerce" requirement, that

history reflects a continuing Congressional intent fully to exercise its regulatory powers.

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315–323, this Court reviewed the 1950 legislative history and found that "[t]he dominant theme pervading congressional consideration * * * was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Id.* at 315. In addition, the legislative history reflected congressional concern over the "desirability of retaining 'local control' over industry and the protection of small businesses." *Id.* at 315–316. Motivated by its concerns over increasing concentration, Congress sought to give "* * * courts the power to brake this force at its outset and before it gathered momentum." *Id.* at 317–318.

Acquisition of firms engaged in local activities may violate Section 7 if the effect of their acquisition may be substantially to lessen competition in relevant geographic and product markets. For example, a firm such as Union could obtain a virtual monopoly of an industry such as the asphaltic concrete industry, with significant interstate consequences, by acquiring one local firm after another across the country. Such a result would be contrary to the aim of Section 7, which was intended to block all acquisitions likely to contribute to increasing levels of concentration. As the House Report to the 1950 amendment stated:

> Acquisitions * * * have a cumulative effect, and control of the market * * * may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition * * *. [H. Rep. No. 1191, 81st Cong., 1st Sess., 8.]

2. In *United States* v. *South-Eastern Underwriters Assoc.*, 322 U.S. 533, this Court, in holding that the insurance business constituted "trade or commerce among the several states" under Section 1 of the Sherman Act, concluded (322 U.S. at 558) that "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements * * *."

Consistent with that view, the Sherman Act has been broadly applied to many local activities which nevertheless substantially affect interstate commerce. See, *e.g.*, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (agreement to fix price paid for California-grown sugar beets); *United States* v. *Frankfort Distilleries*, 324 U.S. 293 (agreement to fix local retail prices); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (local advertising agreements used to injure competitor in interstate competition). As this Court stated in *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464:

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not mat-

ter how local the operation which applies the squeeze.[4]

Since, as discussed earlier (pp. 11–12, *supra*), the Clayton Act was intended to supplement the Sherman Act by reaching anticompetitive practices before they matured into Sherman Act violations, Section 7 of the Clayton Act should also be construed as applying to firms engaged in local operations which substantially affect commerce. In attempting to strengthen the Sherman Act, Congress did not adopt a provision that had a lesser reach than the statute it was designed to bolster.

B. SECTION 3 APPLIES TO LOCAL TRANSACTIONS WHICH SUBSTANTIALLY AFFECT COMMERCE

The principles discussed above with respect to Section 7 are equally applicable to Section 3. As this

[4] *United States* v. *Yellow Cab Co.*, 332 U.S. 218, did not limit the Sherman Act to purely interstate activities. In that case this Court held that while a conspiracy among taxi cab companies to control the transportation of passengers between railroad stations in Chicago was within the reach of the Sherman Act (332 U.S. at 229), transportation of passengers to and from the stations to homes, offices, and hotels had only a "casual and incidental" relationship to interstate commerce (332 U.S. at 230–232). The Court noted that a traveler has complete freedom to arrange his transportation by several means of conveyance, of which taxi cab service is only one. The Court cautioned, however, that it was not "establish[ing] any absolute rule that local taxicab service to and from railroad stations is completely beyond the reach of federal power or even beyond the scope of the Sherman Act. * * * All that we hold here is that when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation" (332 U.S. at 232–233).

Court stated in *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, the Clayton Act was designed to supplement the Sherman Act and thus it "* * * sought to reach the agreements embraced within its sphere in their incipiency, and in [Section 3] to determine their legality by specific tests of its own which declared illegal [transactions] * * * which may 'substantially lessen competition or tend to create a monopoly.'" 258 U.S. at 356.

Section 3 of the Clayton Act prohibits any person "engaged in commerce" from engaging in certain transactions "in the course of such commerce." The words "such commerce" refer to the commerce in which the person in question is "engaged". Indeed, the legislative history confirms that the phrase was intended to have precisely this meaning.

The House version of Section 3 did not contain the "in the course of such commerce" phrase; it simply prohibited certain transactions by persons "engaged in commerce." Although the phrase "in the course of such commerce" which the conference committee added was not extensively discussed in the reports or debates, the remarks of Senator Walsh indicate that it was added to Section 3 to make clear that the section applied only to transactions which Congress could constitutionally regulate. See 51 Cong. Rec. 16115.

Senator Walsh's concern presumably arose from this Court's 1908 decision in the *First Employers' Liability Cases*, 207 U.S. 463. The original Employers Liability Act, 34 Stat. 232, imposed liability upon every common carrier "engaged in trade or commerce" between states to *any* employee injured by

reason of the negligence of any of the carrier's officers, agents or employees. This Court held the Act invalid because imposing liability in favor of any employee "without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce." 207 U.S. at 498. Congress promptly enacted a new statute imposing liability upon such common carriers in favor of "any person suffering injury while he is employed by such carrier in such commerce." 35 Stat. 65. That statute was upheld in the *Second Employers' Liability Cases*, 223 U.S. 1.

Since the sole purpose of the "course of such commerce" limitation was to exclude transactions which are not subject to federal regulation, the phrase should not be interpreted to exclude transactions which are subject to that regulation. Accordingly, Section 3 of the Clayton Act is applicable to all tying arrangements and exclusive dealing contracts which substantially affect interstate commerce.[8]

C. THE PRINCIPLES OF *FEDERAL TRADE COMMISSION* V. *BUNTE BROS.*, 312 U.S. 349, ARE NOT APPLICABLE TO THE CLAYTON ACT

While petitioners concede that the commerce clause permits federal regulation of local activities substantially affecting interstate commerce, they contend, relying on *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, that Congress must use explicit language indicating an intent to regulate such activities. Since the Clayton Act does not contain language such as "affecting commerce," petitioners argue that it must be construed as applying only to interstate activities (Pet. Brief, p. 38).

In *Bunte Bros.*, this Court held that the words "in commerce" in Section 5 of the Federal Trade Commission Act did not encompass local activities which substantially affect commerce. The decision was based on two grounds: (1) a restrictive principle of statutory construction derived from an examination of the commerce provisions in legislation enacted between 1935 and 1940, and (2) the Commission's own restrictive construction of the Act, reflected in its unsuccessful attempt in 1935 to obtain legislation extending the Act to local activities affecting commerce. Neither rationale may properly be applied to the Clayton Act.

1. The principle of statutory construction adopted in *Bunte Bros.* is of doubtful validity in light of this Court's subsequent decision in *South-Eastern Underwriters, supra.* The principle was based upon and reflected a method of legislative drafting which embodied contemporaneous judicial decisions re-

[8] *Rosemound Sand and Gravel Co.* v. *Lambert Sand and Gravel Co.*, 469 F. 2d 416 (C.A. 5), does not support petitioners' contention that Section 3 is inapplicable to intrastate sales. Although the court of appeals stated that the absence of "interstate business" disposed of the Clayton and Robinson-Patman Act claims, the opinion does not describe the Clayton Act claims and does not analyze the relevant statutory language or legislative history. Moreover, in *Rosemound* the court held that the defendant's activities did not affect commerce under the Sherman Act. Thus, the opinion does not hold that transactions which are within the Sherman Act because they "affect commerce" are not "in the course of such commerce" for purposes of Section 3 of the Clayton Act.

strictively construing the reach of the commerce clause.[6] It assumes that the Congress which wrote the Clayton Act in 1914 intended to freeze the reach of that Act "within the mold of then current judicial decisions defining the commerce power." *South-Eastern Underwriters, supra,* 322 U.S. at 557. This proposition was rejected in *South-Eastern Underwriters* with respect to the 1890 Congress which adopted the Sherman Act. It must also be rejected as applied to the 1914 Congress which passed the Clayton Act—a statute that was intended to broaden the earlier legislation.

Although Congress' power to regulate intrastate rail rates was affirmed in the *Shreveport Rate Cases,* 234 U.S. 342, decided in 1914, it is uncertain whether that decision was viewed as of general application or as a specialized rule applicable only to the regulation of transportation.[7] Indeed, although *Bunte Bros.* refers

[6] The Court referred to the following provisions: The National Labor Relations Act, §2(7), 9(c), 10(a), 29 U.S.C. 152(7), 159(c), 160(a), enacted in 1935; the Bituminous Coal Act, §4-A, 15 U.S.C. (1940 ed.) 834, enacted in 1937; and a jurisdictional provision of the Federal Employers Liability Act, §1, 45 U.S.C. 51, added in a 1939 amendment. It is likely that the drafting style used in these acts was a result of such decisions as *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, decided in 1935, which drew a sharp distinction between "flow of commerce" and "affecting commerce" jurisdiction.

[7] The significance of the *Shreveport Rate* decision was clouded by subsequent decisions such as *Hammer* v. *Dagenhart,* 247 U.S. 251, in which an act to prevent interstate commerce in the products of child labor was declared invalid on the ground that "* * * production of articles, intended for interstate commerce, is a matter of local regulation" (247 U.S. at 272). Although various decisions of this Court both before and after the *Shreveport Rate* case can be read as establishing

to the "Shreveport Doctrine" as being in existence in 1914, the Court declined to attribute it significance, noting that (312 U.S. at 353) "[t]ranslation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

Even, however, if it is assumed that the power to regulate local matters affecting commerce was recognized in 1914, there is no suggestion in the *Shreveport Rate Cases* or any other decision of the time that particular language was necessary to exercise that power. Neither the congressional debates with respect to enactment of the Clayton Act nor the judicial opinions of that period indicate any disposition to draw a sharp line between interstate commerce and local activities which affect interstate commerce. On the contrary, judges and legislators of that era tended to equate "commerce among the states" with all commerce which is subject to federal regulation.

In *Gibbons* v. *Ogden,* 9 Wheat. 1, Chief Justice Marshall said (9 Wheat. at 194): "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one." The commerce "which concerns more States than one" includes all commerce within a state which affects interstate commerce. This Court adhered to that definition when the Clayton Act was passed.

that the Commerce Clause extends to intrastate activities affecting interstate commerce, the issue was not definitely settled until the late 1930's and early 1940's in such decisions as *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, *United States* v. *Darby,* 312 U.S. 100, and *Wickard* v. *Filburn,* 317 U.S. 111.

In the *Second Employers' Liability Cases*, 223 U.S. 1, which was decided two years before the enactment of the Clayton Act, this Court said (*id.* at 46–47):

> The phrase "among the several States" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.

In the following year this Court said in the *Minnesota Rate Cases*, 230 U.S. 352, 398:

> The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States.

The draftsmen of the Clayton Act were presumably aware of those decisions and undoubtedly assumed that using the phrase "among the several States" in their definition of commerce would be sufficient to include all commerce *except* "that commerce which is confined within one State and does not affect other States."

2. The second ground underlying *Bunte Bros.*—the agency's own restrictive interpretation of the statute and its unsuccessful legislative attempt to broaden the Act—is inapplicable to the Clayton Act. Neither the Department of Justice nor the Federal Trade Commission has interpreted the Clayton Act as inapplicable to local transactions affecting commerce, and neither has sought amendatory or clarifying legislation dealing with the problem. The 1950 amendments, which dealt only with Section 7, did not focus on the commerce definition. Thus, contrary to petitioners' contention, those amendments cannot be read as reflecting a congressional intent that Section 7 be limited to interstate transactions (Pet. Brief, p. 38).[8]

Indeed, although the legislative history of the 1950 amendments contains no reference to the "engaged in commerce" phrase of Section 7, the discussion of the "any section of the country" language of that section is inconsistent with petitioners' contention. The Senate Report observed (S. Rep. No. 1775, 81st Cong., 2d Sess., 4):

> As the bill originally stood it was to be violated if, among other things, competition was substantially lessened "* * * in any community * * *" of the country. The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise in

[8] In any event, this Court's decision in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, casts considerable doubt on the continued validity of these factors in statutory construction. There this Court, in holding Section 7 of the Clayton Act applicable to bank mergers, rejected the argument that the passage of the Bank Merger Act of 1960 and enforcement policies of the Justice Department indicated that Section 7 did not reach bank mergers. With respect to the passage of the Bank Merger Act, this Court observed that (374 U.S. at 348–349) "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Although the Justice Department had at one time held the view that Section 7 did not reach bank mergers, this Court found that view to be a misunderstanding of the scope of Section

a small town from buying up another local enterprise in the same town. As a consequence, the word "community" was dropped from the subsequent versions of the bill.

Implicit in this analysis is the assumption that as originally drafted the bill covered such local mergers. If Congress had thought that the "engaged in commerce" language excluded mergers of local firms, there would have been no need to adopt the "section of the country" language in order to exclude mergers of minor impact. Therefore, to the extent that the 1950 Congress considered the "engaged in commerce" language, it must have assumed that it covered firms engaged in local activities which substantially affect interstate commerce. Any other assumption would have conflicted with the basic purposes of the 1950 amendments, which were designed to make Section 7 a more effective instrument for preventing anti-competitive mergers.

Finally, even assuming the validity of the explicit language principle of construction, *Bunte Bros.* recognizes that it is not an absolute requirement and that it should not be followed where "* * * the purpose of the Act would be defeated." 312 U.S. at 351. A restrictive interpretation of the Clayton Act "commerce" requirement would, as shown earlier (pp. 14–15, *supra*), frustrate the statutory purposes of the Act. Moreover, unlike Section 5 of the Federal Trade Commission Act, Sections 3 and 7 of the Clayton Act

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7, and as such not binding on the Court (374 U.S. at 349). See also *United States* v. *DuPont Co.*, 353 U.S. 586, *supra*, where this Court rejected the Federal Trade Commission's view that Section 7 of the Clayton Act did not apply to vertical acquisitions.

embody "relatively precise" (312 U.S. at 353) prohibitions and their enforcement is qualified by the requirement that the effect of transactions encompassed by those sections "may be to substantially lessen competition, or to tend to create a monopoly." Thus, the application of Sections 3 and 7 to local transactions substantially affecting commerce would not give a "* * * federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local laws" (312 U.S. at 354).

CONCLUSION

For the foregoing reasons, Sections 3 and 7 of the Clayton Act should be interpreted to apply to firms engaged in local activities which substantially affect interstate commerce.

Respectfully submitted.

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In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,
Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply of Petitioners to Brief of the United States as Amicus Curiae

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On Saturday, October 12, 1974, we received through the mail in the form of corrected page proof a "Brief for the United States as Amicus Curiae". We think this to be untimely under the Court's Rule 42(2), for respondents' brief was due on August 9, 1974, and filed about August 9, and the oral argument is scheduled for October 21. This late filing deprives us of adequate time to reply.

The government does not discuss the questions on which the Writ was granted and does not seek to sustain the reasoning on which the court below rested its decision. The government's

argument is that the terms "engaged in commerce" and "in the course of such commerce" in Sections 3 and 7 of the Clayton Act are the equivalent of "affect commerce" and thus concurrent with the reach of the Sherman Act.

But the government confines itself to Sections 3 and 7 of the Clayton Act *and noticeably avoids applying the argument about the Robinson-Patman Act.** Yet the terms "engaged in commerce" and "in the course of such commerce" are identical in Section 3, in Robinson-Patman, and in Section 2 of Clayton, of which Robinson-Patman is an amendment. As Sections 2 and 3 were enacted at the same time, in 1914, the commerce provisions have the same meaning. We quote them side by side:

Sec. 2. (38 Stat. 730; 15 USCA, sec. 13.)

That it shall be unlawful for *any person engaged in commerce, in the course of such commerce,* either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce:*

Sec. 3. (38 Stat. 731; 15 USCA, sec. 14.)

That it shall be unlawful *for any person engaged in commerce, in the course of such commerce,* to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, *where the effect of such lease,* sale, or contract for sale or such condition, agreement or understanding *may be to substantially lessen competition or tend to create a monopoly in any line of commerce."*

All emphasis in quotations is added.

*The Robinson-Patman Act is not a favorite of the Antitrust Division of the Department of Justice.

Not only are the terms in Sections 2 and 3 the same, but each adds another requirement, that the "effect * * * may be substantially to lessen competition or tend to create a monopoly in any line of commerce." If the words "engaged in commerce" and "in the course of commerce" in Section 3 meant what the government contends, they would be pure surplusage, for they would already be totally encompassed in the "effect" clause.

Furthermore, if the terms "engaged in commerce" and "in the course of such commerce" mean what the government now claims, the lengthy discussion about Section 3 in *Standard Oil Company of California v. United States,* 337 U.S. 293 (1949) would have been unnecessary.

The 1950 amendments to Section 7 of the Clayton Act made no change in the commerce provisions of Section 7, and they ran *pari passu* with Sections 2 and 3, viz.:

"Sec. 7. (38 Stat. 731; 15 USCA, sec. 18.)

"That no corporation *engaged in commerce* shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation *engaged also in commerce, where the effect* of such acquisition *may be to substantially lessen competition* between the corporation whose stock is so acquired and the corporation making the acquisition, *or to restrain such commerce* in any section or community, or tend to create a monopoly *of any line of commerce."*

Here again, if the words "engaged in commerce" meant what the government now asserts, they were surplusage for they would have already been contained in the "effect" clauses and certainly in the words "to restrain commerce" which read like the Sherman Act.

These sections cannot rationally be read in any way other than as requiring (1) *not only* that the activities substantially affect or restrain interstate commerce, *but also* (2) that they or the parties be "engaged in commerce". The government's new revelation of what these sections mean not only rewrites them but deletes from them the significant terms entirely.

The other arguments of the government are similar to some made in respondents' brief. With the limited time for reply, we adopt as further reply the discussion at pp. 8 through 20 of the "Reply Brief for Petitioners Union Oil Company of California and Industrial Asphalt, Inc.," filed on October 5, 1974. Inasmuch as respondents applied to the Robinson-Patman Act the same arguments that the government applies only to Sections 3 and 7 of the Clayton Act, a major portion of the discussion we adopt is to be found in the discussion in our reply brief above of the Robinson-Patman Act.

CONCLUSION

We respectfully submit that Sections 3 and 7 of the Clayton Act cannot bear the interpretation the government's amicus brief would force upon them.

Dated: San Francisco, California, October 15, 1974.

Respectfully submitted,

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APPENDIX A.

Order.

Original Filed May 31, 1972, Clerk, U.S. Dist. Court, San Francisco.

United States District Court, Northern District of California, Master File, No. 50173-RES, No. C-71-608-RES.

In Re Coordinated Pretrial Proceedings In Western Liquid Asphalt Cases.

This Document Relates to: Copp Paving Company, Inc., et al., Plaintiffs, v. Gulf Oil Corporation, et al., Defendants.

This is one of the Western Liquid Asphalt cases.[1] Plaintiffs seek damages and injunctive relief for anti-trust law violations alleged to have been committed by the defendants in the sale and marketing of liquid asphalt and asphaltic concrete. The complaint alleges in a first claim:

1. Price fixing and a monopoly in the sale and marketing of liquid asphalt and asphaltic concrete. 15 U.S.C. §§ 1 and 2.

2. Discrimination against plaintiffs by reason of price and credit concessions to some customers and sales to plaintiffs' competitors at unreasonably low prices. 15 U.S.C. § 13(a).

3. Unlawful exaction from customers of agreements not to use or deal in plaintiffs' products and services. 15 U.S.C. § 14.

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[1]Pursuant to 28 U.S.C. § 1407 the cases were transferred to the United States District Court for the Northern District of California for coordinated or consolidated pretrial proceedings. *See In re Western Liquid Asphalt*, 303 F.Supp. 1053 (J.P.M.L. 1969); *In re Western Liquid Asphalt*, 309 F.Supp. 157 (J.P.M.L. 1970).

4. Acquisition of stock, lessening competition and tending to create a monopoly. 15 U.S.C. § 18.

The second claim is substantially similar to the first except that it charges the violations under the California Cartwright Act (California Business and Professions Code § 16720).

Defendants by a series of motions seek to eliminate from this case the issues which are not common to the remainder of the Western Liquid Asphalt litigation. The court has heretofore stayed the discovery particular to this case and has ordered discovery to disclose the court's subject matter jurisdiction as to the asphaltic concrete issues.

I have assumed for the purposes of this order that the plaintiffs have proved all that they could as to the interstate character of their claim. In December 1971 it appeared to the court that there were potential jurisdictional problems which should be decided prior to the large-scale discovery on the merits which the plaintiffs proposed. The court ordered that discovery be directed to the jurisdictional problems, and plaintiffs made no request to enlarge the time allowed for that discovery. While in this day of notice pleadings and liberal discovery a plaintiff may initiate a case with no more than hope that his discovery will unearth something, I have acted on the premise that before parties should be required to submit to a burdensome discovery on the merits the facts supporting the jurisdiction of the court should be disclosed.

Liquid asphalt is a by-product of the refining of petroleum. It is extensively used in connection with the

construction and repairing of road and highway and other surfaces. Liquid asphalt does move in interstate commerce.

Asphaltic concrete is made by combining aggregates, fillers, and hot liquid asphalt in a hot plant operated at temperatures of approximately 375°F. The asphaltic concrete is discharged into a dump truck and delivered to the job, where it is placed at a temperature of about 275°F.

The traffic in asphaltic concrete is essentially local. The requirement that it be delivered hot plus the high costs of transportation as compared to the value of the product require that a hot plant serve a relatively restricted area. In this case plaintiffs' business was confined to an area near Los Angeles with a radius of 30 to 35 miles. None of the plants in competition with the plaintiffs delivered out of California. A more than de minimis quantity of the asphaltic concrete delivered by plaintiffs and their competitors is delivered for use on interstate highways.

While liquid asphalt moves in interstate commerce, the liquid asphalt used by plaintiffs and their competitors all comes from the State of California, which is an exporter of liquid asphalt. The aggregate used likewise are produced in California. The jurisdictional problem arises out of the fact that plaintiffs and plaintiffs' competitors manufacture a product out of California raw materials for sale and delivery in California.

The jurisdictional problem must be solved by examining the facts under the "in commerce" and the "affecting commerce" theories. *Yellow Cab Company of Nevada v. C. A. Christmas, et al.*, No. 25,567 (9th Cir. Mar. 1, 1972).

As indicated, asphaltic concrete does not move in interstate commerce except under exceptional circumstances, none of which are present here. Hence none of the acts charged to the defendants affect in any way the interstate movement of asphaltic concrete. Plaintiffs contend, however, that the use of the asphaltic concrete in the interstate highways puts it "in commerce" within the meaning of the Sherman Act. Plaintiffs point to the authorizing language in the Federal-Aid Highway Act (23 U.S.C. § 101(b)) which expressly relates the interstate highways to interstate commerce, to 23 U.S.C. § 113, which expressly subjects interstate projects to the terms of the Davis-Bacon Act (40 U.S.C.A. §§ 276(a) *et seq.*), to *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943) holding that vehicular roads are instrumentalities of interstate commerce and that persons repairing them are "engaged in commerce" within the scope of the Fair Labor Standards Act (29 U.S.C. §§ 201 *et seq.*), and to *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953), holding that persons locally employed producing amesite for local use in an interstate highway are engaged in the "production of goods for commerce" and for that reason are protected by Section 7(a) of the Fair Labor Standards Act (29 U.S.C.A. § 207(a)). The conclusion which plaintiffs draw from these authorities is that since interstate highways are in commerce parties supplying materials for the repair and construction of them are likewise in commerce and that there is jurisdiction under the Sherman Act.

Word meanings found in one legally regulated area may[2] or may not[3] be useful in determining the word

[2]*Overstreet v. North Shore Corp., supra.*

[3]*Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. 349 (1941).

meanings to be used in another. The Sherman Act forbids conspiracies "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. In providing guidelines for the interpretation of the Act courts have used the terms "in commerce" and "affecting commerce."

Both the language[4] of the decisions under the Sherman Act and the results reached by them indicate that the words "in commerce" are used in connection with local acts which do in fact affect in any degree the flow of interstate commerce. Thus in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the defendant's acts were designed to shut down a radio station doing an interstate business. In *United States v. Bensinger Company*, 430 F.2d 584 (8th Cir. 1970), the defendant conspired to fix the price of a single dishwasher which was itself in interstate commerce. In *Las Vegas Merchant Plumbers Ass'n v. United States, supra*, the evidence showed that as a result of the alleged conspiracy plumbers refused to work for a foreign plumber using imported fixtures.

On the other hand if the local act, though done in a business which is in interstate commerce, does not affect the flow of such commerce, then the "in commerce" theory is not satisfied. Thus in *Yellow Cab Company of Nevada v. C. A. Christmas, supra*, the court quoted with approval from *Page v. Work, supra*, as follows:

> The record is clear that appellee newspapers and Consolidated were engaged in interstate com-

[4]*Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1954), *rehearing denied*, 348 U.S. 889 (1954); *Page v. Work*, 290 F. 2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961); and *Yellow Cab Co. of Nevada v. C. A. Christmas, supra.*

merce by virtue of (1) their regular purchases of newsprint and other supplies from sources outside of California; (2) the dissemination of national news; (3) their carrying of national advertising; and (4) a few-out-of-state subscribers.[5]

Yet, since the conspiracy related solely to local advertising, the court held that the defendant's activities did not affect the flow of commerce. I conclude that the plaintiffs' position cannot be maintained on the "in commerce" theory.

The question—Did the defendants' local activities substantially affect commerce?—remains.

Plaintiff Ernest Copp's affidavit is to the effect that Sully-Miller Contracting Company (Sully-Miller), a subsidiary of Union Oil Company of California (Union), and Industrial Asphalt, Inc., a subsidiary of Gulf Oil Corporation, together control 75% of the paving business in Southern California. It is claimed, and for the purposes of this order it is assumed, that Sully-Miller and Industrial Asphalt, Inc. are given preferential prices for liquid asphalt by their parent corporations which produce asphalt and that it is as a result of this competitive advantage that they have injured plaintiffs and gained for themselves a substantial corner on the paving market in Southern California.

Defendants' dealings in asphaltic concrete bear two possible relationships to restraints of interstate commerce. It is conceivable that a monopoly with respect

[5]It is noted that these activities are sufficient to put a newspaper in interstate commerce for the purpose of the National Labor Relations Act (*Associated Press v. N.L.R.B.*, 301 U.S. 103 (1937)), and the Fair Labor Standards Act (*Sun Publishing Co. v. Walling*, 140 F.2d 445 (6th Cir. 1944), and *McComb v. Dessau*, 89 F.Supp. 295 (S.D. Cal. 1950)).

to a product used in interstate highways could so increase the price of the product and the subsequent cost of the highways that fewer and poorer highways would be constructed and that interstate commerce could thus be affected. There is no evidence which gives any substance to this possibility. *Cf. Uniform Oil Co. v. Phillips Petroleum Co.*, 400 F.2d 267 (9th Cir. 1968).

As indicated, liquid asphalt does move in interstate commerce although the asphalt used by plaintiffs and defendants here was produced in California. It is possible as in *Las Vegas Merchant Plumbers Ass'n v. United States, supra*, that the agreement to divide an intrastate market for products moving in interstate commerce can affect commerce. It is sufficient here to say that plaintiffs do not suggest a theory (much less support it) by which a division of an intrastate market for asphaltic concrete produced from local liquid asphalt could affect the interstate market in liquid asphalt.

I conclude that the local activities of the defendants with regard to asphaltic concrete did not have a substantial impact on interstate commerce.

I conclude that the court should not, if it could, accept jurisdiction of the disputes as to the asphaltic concrete under the California law as pendent to the court's jurisdiction of the liquid asphalt claims. The issues differ not only because of the difference in the product involved but because of the difference in the nature of the cases. The case as to liquid asphalt is an action by a consumer seeking to recover damages caused by an alleged conspiracy to fix prices. To the extent that plaintiffs seek that relief their case remains. The issues raised as to the various methods of unfair competition practiced by the defendants in connection

with asphaltic concrete are not common to the liquid asphalt claims—they require a consideration of different facts and different laws. It is not in the interest of the expeditious treatment of these cases to add any extraneous issues to the massive and complex liquid asphalt litigation.

The defendant Sully-Miller neither produces nor markets liquid asphalt and does no interstate business of any kind.

IT IS THEREFORE ORDERED:

1. As to defendant Sully-Miller Contracting Company:

That there being no issue of material fact as to the defendant Sully-Miller Contracting Company its motion for summary judgment should be and is hereby granted and the plaintiffs are denied all relief.

2. As to the remaining defendants:

All discovery and further proceedings herein shall be limited to the following issues: (a) With respect to liquid asphalt whether said defendants, or any of them, violated 15 U.S.C. §§ 1, 2, 3, 13(a), 14 or 18, and if so (b) Whether and to what extent, if any, plaintiffs or any of them were injured in their businesses or properties by reason of said violations, if any.

3. No discovery or further proceedings shall be had herein with respect to any of the remaining claims herein asserted, *viz.*:

(a) Any claims that defendants, or any of them, violated 15 U.S.C. §§ 1 or 2 in connection with the marketing of asphaltic concrete;

(b) Any claims that defendants, or any of them, violated 15 U.S.C. § 13(a) in connection with the marketing of asphaltic concrete;

(c) Any claims that defendants, or any of them, violated 15 U.S.C. § 14, in connection with the marketing of asphaltic concrete;

(d) The claim that defendant Union Oil Company of California violated 15 U.S.C. § 18 by acquiring all the capital stock of defendant Sully-Miller Contracting Company;

(e) Any claims that defendants, or any of them, violated Section 16720 of the California Business and Professions Code with respect to asphaltic concrete.

I am of the opinion that the orders made herein and each of them involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from these orders may materially advance the ultimate termination of the litigation.

DATED this 29th day of May, 1972.

/s/ RUSSELL E. SMITH
United States District Judge

Service of the within and receipt of a copy thereof is hereby admitted this.....day of August, A.D. 1974.

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_____

Supreme Court, U. S.
FILED
OCT 7 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,
Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Reply Brief for Petitioners Union Oil Company of California and Industrial Asphalt, Inc.

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Two unrelated lines of argument run through Copp's (Respondents') brief,[1] and, although unrelated, they are not kept separate. The first is that sellers of asphaltic concrete, although wholly local, and sales of that substance, also wholly local, for use locally, are nevertheless "*in* commerce" because the substance is used in making or repairing roads. This is the reasoning of the court below. The second is not advanced by that court but is

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All emphasis in quotations in this brief has been added unless otherwise noted.

1. Hereinafter cited as "Resp. Br." Petitioners' opening brief will be referred to as "O.B."

urged by Copp, perhaps in apprehension that the reasoning below is untenable. It is that the provisions of the Robinson-Patman and Clayton Acts, despite the plain limitation of their language, should be read as if Congress has exercised all its constitutional power, as has been said of the Sherman Act, and therefore should be read as if their only jurisdictional requirement is that there be an *effect* on interstate or foreign commerce although neither party nor activity is "in commerce".

In their discussion of the specific statutes (Parts II through V of Resp. Br.) the reasoning of the court below is hardly more than alluded to; the bulk of the argument is devoted to the second line of reasoning.

Before answering Copp's argument, we observe that Copp does not dispute any of the facts set forth in our opening brief or add any new, true and relevant fact. There are some unwarranted but irrelevant innuendoes upon which we shall comment at appropriate places in the argument below. There is the incorrect assertion (Resp. Br. 11, 12) that petitioners stipulated that the allegations of the complaint about "effect" on interstate commerce were admitted for purposes of the motions for summary judgment. The incorrectness of that assertion is shown by the very record (13 R. 306) cited to support it.[2] As noted in our opening brief, the district court directed Copp to point to evidence of jurisdiction after it had completed its discovery, and the court, discharging its duty and exercising its power to find the facts bearing on jurisdiction, then *found* that there was no evidence of any effect on interstate commerce (See O.B. pp. 7, 8, 39, 40). The court below did *not* reverse that finding of fact, holding, instead, that there was "effect" as a matter of law. We do not discuss this matter further, because this Court has not brought before it the Sherman Act

2. The district court then stated the question as one left for it to decide (Pet. App. A, p. 5):

> "The question—Did defendants' local activities substantially affect commerce—remains."

issue where the controlling fact is "effect", and on the Robinson-Patman and Clayton Act issues the questions are whether more than effect is not required for jurisdiction.

ARGUMENT

I. The Use of Asphaltic Concrete in Roads Does Not Place the Seller or the Sale "in Commerce".

The term "interstate highway" is not a term of art. It was used in this case to signify roads for which federal financial aid is given to the States under the Federal-Aid Highway Act, 23 U.S.C. §§ 101, et seq. (72 Stat. 885, as amended). Such was the sense in which the term was used in the pleadings and in the stipulation on the subject (Appendix, pp. 17, 18, 27, 28, 181), and it is the sense in which Copp's brief uses it (e.g., Resp. Br. 2, fn. 2).

That very fact demonstrates the meaninglessness of the concept for this case. What the Federal-Aid Highway Act provides is for grants of money to the States to aid them in constructing roads. That aid is not confined to major routes. There are various classifications of roads, and the financial grant ranges down from 90% of the cost, depending on the classification. Federal aid is given to numerous things, such as forest roads and trails; to roads, streets and parkways within a state constituting a system of connected highways (Section 103(b)); to farm-to-market roads, local rural roads, county and township roads (Section 103(c)), as well as to an interstate system comprised of roads and streets so selected as to connect principal centers by routes as direct as possible (Section 103(d)). City streets are part of the interstate system. Thus Copp states (Resp. Br. 24, fn. 6) that Industrial and Sully-Miller must comply with a certain Executive Order "in order to perform work on *county* roads funded under the Federal Aid Highway Act."

The classification for which states receive the largest percentage of cost is the "interstate highway system". But roads in this classification are merely state roads one end of which connects at a state line with a road of another state in the most direct route between major cities. Included in the interstate highway system are "connectors" within a state. For example, the whole of Interstate 480 lies in San Francisco between the intersection of Broadway and Sansome Streets and the intersection of First and Harrison Streets. "Interstate 80" does not traverse Nevada; there are only disconnected stretches so labeled, alternating with stretches labeled "40" and not part of the interstate system.

The nature of federal highway aid and of what is aided is summed up in the regulations of the Secretary of Transportation, particularly 23 C.F.R. § 1.6(a) and (c), containing the following:

> "(a) *Selection or designation.* * * * systems of Federal-aid highways are selected or designated by any State that desires to avail itself through its State highway department, of the benefits of Federal aid for highways. Upon approval by the Administrator of the selections or designations by a State highway department, such highways shall become portions of the respective Federal-aid highway systems, and all Federal-aid apportionments shall be expended thereon.
>
> * * *
>
> (c) *Selection considerations.* Each Federal-aid system shall be so selected or designated as to promote the general welfare and the national and civil defense and to become the pattern for a long-range program of highway development to serve the major classes of highway traffic broadly identified as (1) interstate or interregional; (2) *city-to-city primary,* either interstate *or intrastate;* (3) *rural secondary or farm-to-market;* and (4) *intraurban.* The conservation and development of natural resources, the advancement of economic and social values, and the promotion of desirable land utilization, as well as the existing and potential highway traffic and other pertinent criteria are to be considered

> when selecting highways to be added to a Federal-aid system or when proposing revisions of a previously approved Federal-aid system."

State highways in California are designated by state statute (Cal. Streets and Highways Code, §§ 300, et seq.) and these designations are retained after federal aid.

Congress has *not* sought by the Federal-Aid Highway Act to regulate highways or the operations of those working on or supplying materials for use in highways, and it has not done so. What the Act does is to offer money to the States. It declares the conditions which must be met before money will be given, but a State willing to forego the gift can ignore the conditions. And no condition stated by Congress in the Act, including those referred to by Copp (Resp. Br. 24, 25), has any connection whatever with the Robinson-Patman Act or Sections 3 or 7 of the Clayton Act.[3]

Copp calls attention to the provision of Section 112(c) of 23 U.S.C. that in granting aid the Secretary of Transportation shall require as a condition precedent to his approval of contracts for construction of roads awarded by competitive bidding a sworn statement that the party to whom the contract is awarded has not "taken any action in restraint of free competitive bidding in connection with such contract." Instead of aiding Copp's case, this undermines it. If the fact that one constructing roads or supplying material to be used in their construction puts him and his activities "in commerce", then the whole body of federal antitrust regulation would automatically apply without more; the narrow regulation against restraint of competitive bidding in respect of the contract would already have been included

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3. The statement at Resp. Br. 14 that petitioners conceded "that the interstate highway system and those who build it, supply it, and work on it are encompassed by and subject to control and authority of the federal government" is not true. What was admitted is just what is stated above.

as a small part of the whole body of regulation, and it would have been unnecessary to enact Section 112(c) to impose but a small piece of the whole as a condition of federal aid.

Highway Statistics 1971, a publication of the U.S. Department of Transportation and the Federal Highway Administration,[4] notes that the federal-aid highway program is a "grant-in-aid type of program" (p. 93), and that numerous federal agencies share in federal-aid highway programs, including the Forest Service of the Department of Agriculture, the National Park Service, and the Department of Defense (p. 1). It states (p. 11) that:

> "Under the federal-aid highway program, initiative for selecting routes eligible for improvement with Federal-aid funds rests with the States, and these routes continue to remain under the jurisdiction of the States or local governments which are responsible for administering and maintaining them as part of the State or local highway systems."

And (pp. 185, 186):

> "Except for minor amounts of highway mileage, primarily in Federal parks and installations, practically all of the roads and streets in the United States are under the jurisdiction of the States and local governments. The Federal-aid systems are, basically, segments of State and local mileage eligible for Federal Aid. All highways in the Federal-aid systems are selected by the State and local governments, subject to the approval of the Federal Highway Administration."

There is no reason to suppose that the constitutional basis of the Federal-Aid Highway Act is the power to regulate commerce. Its provisions relate to military defense, national parks and forests, and the general welfare of the nation, and thus probably are supported by several provisions of the Constitution, primarily the "General Welfare" clause of Art. I, Sec. 8, Cl. 1 (*United States v. Butler*, 297 U.S. 1 (1936)). Whether the constitutional powers of Congress are such that it could impose its will on everything in any way connected with roads and road building is not a question in this case. Congress has not sought to do so.

4. U.S. Government Printing Office, Stock Number 5001-00047.

The Federal-Aid Highway Act offers no assistance at all in deciding the present case, nor did the court below suggest that it did. The fact of federal aid has no bearing on whether seller or sales are "in commerce". The only fact to be examined is the one on which the court below relied, viz., the fact that roads link up, one with another, and eventually a road crosses a state line. It is meaningless to the term "in commerce" whether a road is an "arterial," a "connector," a city street, or a farm-to-market road. There can be no logical division, whereby the reasoning of the court below applies to one kind of road and not another. That is why we said in our opening brief (p. 33):

> "Every street in every city, and every road anywhere in the nation, unless it connects with no other, is part of an interstate network of highways. Is therefore the seller of anything used in a street or road 'in commerce'? By that reasoning, the local society for care of the blind, selling their brooms to the street sweeper, or the street cleaner itself, or the little tow truck operator removing illegally parked cars from obstructing the street, all these are engaged 'in commerce'."

On May 31, 1974, in a decision not reported until after our opening brief was filed, the Fifth Circuit in *Scranton Construction Co. v. Litton Industries*, 494 F.2d 778, rejected the contention that the Robinson-Patman Act applies to local sales of readymix concrete used in the construction of a "shipyard, a massive instrumentality of interstate and foreign commerce" (p. 781), held that the lack of any sale crossing a state line is fatal, and then, *addressing itself to the very decision of the court below in the present case, said* (p. 781):

> "And though we recognize that the Supreme Court has granted certiorari in a second-line injury case where our Brethren of the Ninth Circuit have dispensed with the requirement of interstate sale on the ground that sales of a commodity to be used in constructing an instrumentality of interstate commerce were involved, and that thus a new deliverance in this area may soon come, we are not disposed to depart from our recent decision, supported by well-nigh universal precedent, that interstate sales must be involved for jurisdiction to attach under these acts."

The English language contains a body of terms, each of separate meaning and having an ascending order of reach, viz., "in commerce", "production of goods for commerce," production of or working on "instrumentalities of commerce," and "affecting commerce". They comprise an armory from which Congress can select the tool to achieve a particular purpose. To treat all these terms as synonymous is to corrupt language, and thereby the law, and thus to impoverish Congress. Yet that is what Copp asks the Court to do.

II. The Clayton and Robinson-Patman Acts, Unlike the Sherman Act, Do Not Exercise All the Power of Congress. More Is Required for Their Jurisdiction to Attach Than That Interstate Commerce Be Affected.

Copp's arguments about the specific statutes involved in this case do no more than note the rationale of the court below (e.g., Resp. Br. 36) and then pass on to urge and argue that the several acts are like the Sherman Act in requiring no more than an effect on interstate commerce.[5]

5. The questions on which the Court granted the writ present the Robinson-Patman Act, Section 3 of the Clayton Act, and Section 7 of the Clayton Act in that order, and they were discussed in that order in petitioners' opening brief. Our reply will follow the same order although respondents discuss them in reverse.

A. THERE WAS NO JURISDICTION OF THE ROBINSON-PATMAN CLAIM OF PRICE DISCRIMINATION.

Industrial makes asphaltic concrete entirely in California from California materials and sells it entirely in California, as does Copp.[6]

Copp's primary argument and its grand submission about Robinson-Patman (Resp. Br. 44) is that it, like the Sherman Act, must be construed as exercising all the powers the Constitution would allow Congress to exercise despite the plain limiting language of the statute. The thread of the argument is elusive.

Copp first asserts that the definition of "commerce" in the Robinson-Patman Act is the same as in Section 1 of the Clayton Act (Resp. Br. 36, 37) and in the Sherman Act (Resp. Br. 26). But that definition is merely shorthand that "commerce" means commerce between the states and with foreign countries. There is no issue in this case about the definition. Copp argues that decisions of this Court have expanded the meaning of "commerce". Any such expansion has been in respects not relevant here. There

6. Copp asserts (Resp. Br. 4) that Industrial "manufactures asphaltic concrete at fifty-five hot plants located in Arizona, California and Nevada . . . ." But 53 were in California and all 53 made and sold asphaltic concrete solely in California. There was 1 plant in Arizona, which made and sold asphaltic concrete solely in Arizona and there bought the liquid asphalt it used, and all hot plants with which it competed were located in the Phoenix area of Arizona. Similarly, the 1 plant in Nevada made and sold asphaltic concrete solely in Nevada and there bought the liquid asphalt it used, and all hot plants with which it competed were located in the Las Vegas area of Nevada (App. 117, and 2 R. 476, 477). The large number of plants shows how local the business is.

Copp also asserts that asphaltic concrete is made "from liquid asphalt produced from substantial quantities of foreign and interstate oil" (Resp. Br. 4). There is nothing to support the use of the adjective "substantial". It is a matter of judicial notice that asphalt is a product of the refining of crude oil, chiefly heavy crudes, and that heavy crudes are the typical California crude oil. Moreover, the source of the crude oil from which California refineries derive the asphalt which hot plant operators purchased to compound into asphaltic concrete is irrelevant. As noted at O.B. 6, asphaltic concrete is compounded of 95% rock, sand and aggregates and 5% liquid asphalt.

is no question here about when goods "come to rest"; no asphaltic concrete ever came from without a state or was destined to depart from a state. There is no question here about whether an activity is commerce or some other form of human activity, as was once held about insurance (*United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944)) and is still held about baseball (*Flood v. Kuhn*, 407 U.S. 258 (1972)). The decisions of the Court to which Copp really refers are not decisions expanding the meaning of "commerce" but expanding the reach of the constitutional grant of power to regulate commerce so as to permit regulation of what affects commerce even though the cause and the causers are not "in commerce". What Congress can do is different from what it does do. And in Robinson-Patman it has not chosen to regulate as broadly as perhaps it might.

The issue here concerns the requirement of the Robinson-Patman Act that the person making a discriminatory sale must be "engaged in commerce", that his conduct must be "in the course of such commerce", and that "either or any of the purchases" be "in commerce".

Copp argues (Resp. Br. 40) that the Act was written in terms narrower than the constitutional reach because "The *Schechter* case[7] was decided only two weeks before Representative Patman introduced his original bill" and that but for constitutional doubts raised by *Schechter* the Act would have been broader. This is pointless for a number of reasons. Where a statute is written in terms expressing regulation to the furthest reach of constitutional power, in the most comprehensive possible language, the reach of the statute will keep step with current views of the reach of the power. But where a statute is written with explicit restriction on its reach, courts cannot expunge those restrictions upon an assumption that Congress would have done so had it thought

7. *Schechter Bros. Poultry Co. v. United States*, 295 U.S. 495 (1935).

that it could. The Robinson-Patman Act has been on the books for nearly 40 years, with uniform interpretation, and Congress has not seen fit to rewrite it. Moreover, Congressman Patman has had no doubt of what his bill meant. In W. Patman, *Complete Guide to the Robinson-Patman Act* (Prentice-Hall, 1963), pp. 46-47, he wrote:

> "In those situations in which a person, partnership or corporation has been found to be engaged in commerce, discriminations practiced by him are not subject to the Robinson-Patman Act unless *some* of the different prices charged by him involve sales and shipments of goods across state lines. In other words, subsection 2(a) does not prohibit price discriminations which merely *affect* commerce. Some transactions must be *in* commerce, and not merely those which *affect* interstate commerce, since the Robinson-Patman Act only prohibits discriminations in price made in the course of commerce—that is, interstate commerce." [emphasis in original].

Furthermore, it is rankest speculation that the limitations of Robinson-Patman stemmed from apprehension about the scope of power as stated in the *Schechter* case. If it had been, and if constitutional doubts rather than "policy misgivings as to the wisdom of federal interventions in areas previously regulated by the states" (86 Harvard Law Rev. 765, 771) were the cause of the narrower scope of the Act, Congress would have pushed to the limits allowed by *Schechter* by tracking Schechter's language so as to prohibit discriminations "in or directly affecting commerce". In that way the reach of the Act would have accorded at any given time with judicial views of what directly affects commerce. Instead, Congress chose to impose the requirements that both the sale and the seller be "in commerce".

The requirement of "in commerce" was taken, not from *Schechter*, but from Section 2 of the Clayton Act enacted in

1914 (38 Stat. 730) and is the same as the requirement in Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(1) and (b), also enacted in 1914 (38 Stat. 719). In *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941) (discussed O.B. pp. 25, 26, 37 and 38) the Court, interpreting this very language in the Federal Trade Commission Act, declined to interpret it more broadly than it reads. Possibly to escape the force of *Bunte* decided in 1941, Copp asserts that the change in the Court's outlook about the scope of the commerce clause of the Constitution came with *Wickard v. Filburn*, 317 U.S. 111, in 1942 (Resp. Br. 22). On the contrary, it was in *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937) that the Court advanced from the outlook of the *Schechter* case, and the fundamentals of *Jones & Laughlin* were reaffirmed in *United States v. Darby*, 312 U.S. 100 (1941), which cites *Jones & Laughlin* (at p. 119) and in turn is cited in *Wickard v. Filburn*, 317 U.S. at p. 118. The *Bunte* case was decided just 14 days after *Darby* and thus plainly puts the quietus on the argument that the several acts imposing the requirement of "in commerce" are to be read as if they merely required an effect on commerce. Even after *Darby*, which showed that Congress could have gone farther than it did, the narrower question of what Congress had actually done in particular enactments continued to occupy the attention of the Court. *E.g., Kirschbaum v. Walling*, 316 U.S. 517 (1942); *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943); *Alstate Const. Co. v. Durkin*, 345 U.S. 13 (1953); *Mitchell v. Lublin, McGaughy & Asso.*, 358 U.S. 207 (1959). The Court's opinion in the latter case begins with this observation (358 U.S. at 211):

> "We start with the premise that Congress, by excluding from the Act's coverage employees whose activities merely 'affect commerce', indicated its intent not to make the scope of the Act co-extensive with its power to regulate commerce."

And by amendments in 1961 and 1966 Congress chose to exercise more of its power over wages and working conditions. (See fn. 10, O.B. 20).

Copp argues that the Robinson-Patman Act was intended to expand the provisions of Section 2 of the Clayton Act against discrimination. It did so, but in no respect relevant here. It had been held that Section 2 required both sales between which there was discrimination to be "in commerce". Robinson-Patman expanded the Act by requiring only one of the sales to be "in commerce," by the provision "when either or any of the purchases involved in such discrimination are in commerce". But the very fact that Robinson-Patman retained the requirement of "either or any" while eliminating the necessity that both be in commerce underscores the deliberate intention of Congress that *at least one of the sales* must be "in commerce". Until the decision below, all courts have held that this provision requires that at least one of the sales cross a state line. And, as just noted, the Fifth Circuit in *Scranton Construction Co., Inc. v. Litton Industries Leas. Corp.*, 494 F.2d 778 (1974), reasserted that requirement. It noted that in its decision here the court below had sought to distinguish prior decisions of the Fifth Circuit "on the ground that we were not there required to consider such a nexus," i.e., that "sales of a commodity to be used in constructing an instrumentality of interstate commerce were involved," and it nevertheless rejected the decision of the court below.[8]

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8. Copp cites an earlier decision of the same court, *City of Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871, cert. den. 379 U.S. 900 (1964). It obviously is limited to a Sherman Act situation and was not considered by the court that decided it to apply to Robinson-Patman and Clayton Act matters, as shown, not only by *Scranton*, but also by *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416 (5 Cir. 1972). We discussed the *Ft. Lauderdale* case in our petition for certiorari, but did not refer to it again in our opening brief since the writ was not granted with respect to the Sherman Act issue.

Copp's attempt to rewrite the Robinson-Patman Act by reference to "legislative history" must fail. Copp's argument was borrowed by it, without attribution, from a note by a second-year law student in 22 Hastings Law Journal 1225 (1971) and is answered by a note in 86 Harvard Law Review 765 (1973). The latter, characterizing the legislative history as "unrevealing," states (p. 772):

> "Against the background of such an unrevealing legislative history, the canon of statutory interpretation generally applied by the Supreme Court would seem to require adherence to the literal language of the statute."

In *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763, 767 (7 Cir. 1973), *cert. den.*, 414 U.S. 1146, rehearing denied, ... U.S. ....., 41 L.Ed.2d 1149 (1974), the Tenth Circuit quotes the following passage from p. 769 of the same Harvard Law Review note approvingly:

> "Nor does the complicated legislative history of the jurisdictional provisions of the Act lend much support to *Littlejohn's*[9] disregard of the statutory language. The Robinson-Patman Act as a whole was the product of such a complex series of interrelated legislative proposals that congressional intent is unusally difficult to decipher."

Copp's citation of *Moore v. Mead's Fine Bread*, 348 U.S. 115 (1954) and his criticism of lower courts' uniform interpretation of that case (Resp. Br. 22, 37, 38) are an irrelevant digression. In *Moore*, the defendant did sell its product across state lines, and there was discrimination in price between the local sales which injured the plaintiff and the interstate sales. The Court noted (348 U.S. at 118):

9. The *Littlejohn* decision here referred to was a decision of a panel of the Fifth Circuit which that court later set aside *en banc* in *Littlejohn v. Shell Oil Company*, 483 F.2d 1140, *cert. den.*, 414 U.S. 1116 (1973).

> "Respondent is engaged in commerce, selling bread both locally and interstate. In the course of such commerce, it made price discriminations, maintaining the price in *interstate* transactions while cutting the price in the *intrastate* sales." (Emphasis in original)

Whether, under *Moore*, it is enough that the profits from interstate sales offset losses from local sales or whether, as held in the *Mayer* and other cases, there must be some competitive relationship between the seller making the discriminations and another or between the local purchaser and the interstate purchasers or between the local sales and the interstate sales, is irrelevant to the present case. Here no sales to anyone crossed state lines.

B. THERE WAS NO JURISDICTION OF THE CLAIM UNDER SECTION 3 OF THE CLAYTON ACT

With respect to the Section 3 claim, which is that Industrial sold asphaltic concrete on condition that the buyer not purchase the product from respondents, the only relevant facts are that Industrial's sales were entirely in California, and any sales by Copp of asphaltic concrete would have also to be in California.

Citing *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953), Copp asks, rhetorically, how it can be supposed that Congress intended employees producing material for use in roads to be subject to minimum wage protection but that sellers of the product were not to be covered by Section 3 of the Clayton Act (Resp. Br. 33). The answer is simple: Congress expressed its wishes in quite different language in the two statutes. It chose to lay down different tests for application of the two Acts (all as shown at length in our Opening Brief at pp. 20, et seq.). The innumerable contending economic and social considerations pressing upon Congress for attention were different with respect to the two bodies of regulation, and Congress made its choice among them differently.

The basic vice in Copp's argument lies in overlooking the fact that Section 3 of the Clayton Act not only requires an *effect* on interstate commerce but also requires that the seller be "in commerce", that the tying practice be "in the course of that commerce," and that these requirements come first. Therefore Section 3 is "narrower" than the Sherman Act, the characterization given by the Court in *Standard Oil Company of California, et al. v. United States*, 337 U.S. 293 (1949) (at p. 297), where it also describes Section 3 as "narrowly directed" (p. 312). Citing the *Standard* case Copp in sweeping error says (Resp. Br. 29, 30): "Petitioner, anticipating respondents' reference to Standard Oil Co. & Standard Stations, Inc., supra, do not seriously dispute the fact that the [Standard] decision stands for the proposition that the commerce test for a Section 3 violation is met by practices in commercial activities which may 'affect' interstate commerce. They argue only that no such affect [sic] is possible here because interstate asphaltic concrete sales are not shown." The case does not stand for any such proposition. The fact that Standard *was* "in commerce", that it made numerous sales "in commerce", and that its imposition of exclusive dealing contracts was "in the course of such commerce" was a given datum and the starting point of the decision. Standard's argument was that the next requirement of the Act was absent, that because most of its sales were not interstate there was no substantial effect on interstate commerce, a further requirement of the Act. Thus the Court noted (at p. 297):

> "Obviously the contracts here at issue would be proscribed if § 3 stopped short of the qualifying clause beginning, 'where the effect of such lease, sale, or contract for sale' ".

The only issue presented in the case was that of "effect". In the present case, one never reaches the question of effect, because the hurdle of the first requirement, that the seller, the sales, and

the alleged tying arrangement must be "in commerce", must be cleared, and it is not.

This failure to observe that, while Section 3 does require an "effect" on interstate commerce, its first requirement is that the offender and the offense be "in commerce * * * in the course of such commerce", crops up in another argument. Copp asserts that a purpose of Section 3 of the Clayton Act, like Section 7, is to reach antitrust competitive restraints "in their incipiency" (Resp. Br. 21). From this premise Copp draws the *non-sequitur* that Section 3 has the same jurisdictional reach as the Sherman Act. The "incipiency" standard relates to "effect". The Sherman Act aims at effects on interstate commerce that are *actual, present, existing* and *adverse*. It was natural and understandable for Congress to exercise its full constitutional power to root out that kind of effect—one present and actual—however and by whomever worked, since the prohibitions are curative of a present evil. But the "incipiency" statutes relate, not to present actualities, but to prognostications about probabilities of the future; they are not curative of present evil but forestalling. It was entirely natural for Congress, and understandable, to conclude that regulation like that should operate only where the supposed offender and offense are "in commerce" itself.

The statutes plainly draw the distinction, they are differently worded, there is good reason for the difference, and there is no basis for courts to rewrite the statutes in order to ignore the difference.

C. THERE WAS NO JURISDICTION OF THE CLAIM UNDER THE CELLER-KEFAUVER ACT (CLAYTON ACT, § 7)

The plants of Sully-Miller, the acquired corporation, are entirely in California.[10] It sells no asphaltic concrete to anyone outside of California and operates only in California.

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10. Copp phrases the matter as "principally in Southern California" (Resp. Br. 26), thus leaving at odds the location of the others. They are all in Southern California, as is correctly stated at Resp. Br. 4. Copp's

Section 7 requires that the acquired corporation be "in commerce". To bring Sully-Miller within this requirement, Copp advances the two different lines of reasoning noted at the outset of this brief, but it flees from each for protection in the arms of the other. It begins and ends with a bare assertion, without argument, that the mere fact of highways placed Sully-Miller "in commerce" (Resp. Br. 26, 31), but the 5 pages in between are devoted to urging the second line of reasoning. Then, after devoting the bulk of its discussion to arguing that the words "engaged in commerce" mean no more than "engaged in activities affecting commerce", Copp retreats, saying that this conclusion "is not necessary for the purposes of the decision in this case" (Resp. Br. 31). If not, what less does Copp contend will suffice? Its very next paragraph asserts that " 'Commerce among the several states' means, constitutionally, activities in commerce or which affect commerce." Either that merely reasserts what Copp had just said was not necessary for its case, or else it means only that Congress has the constitutional power to regulate activities affecting commerce. If the latter is what is meant, the statement is true but irrelevant. The language of the Constitution is that Congress has the power "to *regulate* commerce with foreign Nations and among the several States and with the Indian Tribes" (Art. I, Sec. 8, Cl. 3). The term by which Congress chose to demark the extent of its regulation in Section 7 is "in commerce". And so, once again, the question is not what Congress could do but what it did do.

To support its primary contention that Section 7 is to be interpreted as requiring no more than an effect on commerce, Copp advances the same "incipiency" argument made concerning Section

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statement at Resp. Br. 4 that the asphaltic concrete manufactured by Sully-Miller is from asphalt produced "substantially" from interstate and foreign crude oil is shown, at p. 9, fn. 6, *supra*, to be both irrelevant and without support in the record.

3. Our discussion at p. 17, *supra*, answers the argument. Copp then (Resp. Br. 28) quotes from *Transamerica v. Board of Governors*, 206 F.2d 163, 166 (3 Cir. 1953). In our opening brief (at p. 38) we noted that the quotation, read in context, did not conceivably mean that Section 7's requirement that the acquired corporation be "in commerce" was to be ignored or to be interpreted as meaning "affecting commerce". In the *Transamerica* case the court made the quoted utterance in connection with rejecting an argument that the words "corporations engaged in commerce" did not include banks. Section 7 speaks comprehensively of "corporations engaged in commerce"; banking corporations are engaged in commerce, and therefore the natural meaning of the section includes banks.

Copp then poses a supposititious case, that someone acquires 100% of the manufacture and supply of asphaltic concrete and highway asphalt contracting. It would be, Copp proclaims, "a ludicrous defense to a Sherman Act proceeding, on those facts, to assert that asphaltic concrete does not move between states and therefore monopoly powers over these interstate activities is not within the Sherman Act" (Resp. Br. 30). However ludicrous such an assertion might be, the supposititious situation is not relevant. The statute under consideration here is *not* the Sherman Act, which requires no more for jurisdiction than the designated effect on commerce.

The requirements of Section 7 are both more and less stringent than those of the Sherman Act. Under Section 7 the "effect" need not be as stringent—for it need only be incipient rather than actual—but Section 7 does not apply at all unless both acquired and acquiring corporations are "in commerce". The leniency of Section 7 with respect to "effect" is matched by its rigor with respect to when Section 7 applies. Congress was not unmindful that it was not going as far as it constitutionally could. For example,

when Section 7 was enacted in 1914 (38 Stat. 731), it permitted *effect* to be measured "in any * * * community." In 1950, at the time the Celler-Kefauver amendments were introduced, that language was again proposed, but it was rejected for reasons stated in Senate Report No. 1775, 81st Congress, 2d Sess. (1950), p. 4, as follows:

> "As the bill originally stood, it was to be violated if, among other things, competition was substantially lessened '* * * in any community * * *' of the country. The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise from buying up another local enterprise in the same town. As a consequence, the word 'community' was dropped from subsequent versions of the bill."

CONCLUSION

Numerous social, economic and political considerations contest with each other for the attention of Congress when it considers what legislation to enact and whether to exercise the full range of its powers. Congress has a choice of apt terms to express how far it chooses to go in regulating commerce in response to these contending claims. In the Robinson-Patman and Clayton Acts it has chosen its terms with circumspection. Courts should not expand them.

The court below erred in its decision of each of the matters on which the writ was granted. We respectfully submit that its judgment should be reversed and that of the district court reinstated on these matters.

Dated: San Francisco, California, October 4, 1974.

Respectfully submitted,

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No. 73-1012

In the Supreme Court of the United States

OCTOBER TERM, 1974

GULF OIL CORPORATION, ET AL., PETITIONERS

v.

COPP PAVING COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 487 F. 2d 202. The opinion of the district court (Pet. App. A) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1973. The petition for a writ of certiorari was filed on December 28, 1973, and granted on March 25, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The United States will discuss the following question:

Whether the word "commerce" in the phrases "engaged in commerce" and "in the course of such commerce" in Sections 3 and 7 of the Clayton Act includes local activities which substantially affect interstate commerce.

STATUTES INVOLVED

The pertinent statutory provisions involved are set forth at pp. 3–5 of the petitioners' brief on the merits.

INTEREST OF THE UNITED STATES

This case involves the application of Sections 3 and 7 of the Clayton Act, which prohibit certain exclusive dealing agreements and certain stock and asset acquisitions, respectively, to transactions involving firms which, although not themselves directly engaged in interstate commerce, provide products and services for firms that are engaged in such commerce. Two agencies of the United States, the Department of Justice and the Federal Trade Commission, have concurrent jurisdiction to enforce those provisions (see *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 694–695). There is pending before the Court a direct appeal by the United States from a district court judgment dismissing its civil suit challenging, under Section 7 of the Clayton Act, the acquisition of a firm not operating in the flow of interstate commerce but which performs services for firms that operate in

interstate commerce. *United States* v. *American Building Maintenance Industries*, No. 73–1689.

The decision of this Court in this private suit, presenting important questions concerning the reach of Sections 3 and 7 of the Clayton Act, will not only generally affect the government's enforcement of those sections, but is likely to have a significant impact upon the government's appeal in the *American Building* case.

Since the United States is concerned solely with the interpretation of the "commerce" requirements of Sections 3 and 7 of the Clayton Act, we express no views as to whether the transactions involved in this case are encompassed by Sections 3 and 7 as properly applied.

STATEMENT

A. THE PROCEEDINGS

The amended complaint in this civil antitrust suit, filed in the United States District Court for the Central District of California by respondents Copp Paving Company, Inc. ("Copp"), Copp Equipment Company, Inc., and Ernest A. Copp, against Gulf Oil Corporation ("Gulf"), Union Oil Company of California ("Union"), Edgington Oil Company ("Edgington"), Industrial Asphalt, Inc. ("Industrial"), and Sully-Miller Contracting Company ("Sully-Miller") (App. 13–24), alleged that the defendants violated Sections 1 and 2 of the Sherman Act, Section 2(a) of the Robinson-Patman Act, and Section 3 of the Clayton Act, 15 U.S.C. 14, in connection with the sale of liquid asphalt and asphaltic concrete (App.

13–24). The complaint also alleged that Gulf violated Section 7 of the Clayton Act by acquiring all the capital stock of Industrial and that Union violated Section 7 by acquiring Sully-Miller (App. 21).

The defendants moved for summary judgment in favor of Sully-Miller and to limit the issues as to the other defendants (App. 144–145). In response to that motion, the district court dismissed all claims against Sully-Miller and all claims against the other defendants under the Sherman Act, the Robinson-Patman Act and Section 3 of the Clayton Act involving the marketing of asphaltic concrete. It did not dismiss the claims under those provisions involving the marketing of liquid asphalt. The court also dismissed the Section 7 claim based on Union's acquisition of Sully-Miller, but not the Section 7 claim based on Gulf's acquisition of Industrial (Pet. App. 1–8).

On an interlocutory appeal, the Court of Appeals for the Ninth Circuit reversed the district court's partial summary judgment in favor of the defendants other than Sully-Miller, and reserved the judgment with respect to the final summary judgment in favor of Sully-Miller (Pet. App. 15).

B. THE COMPANIES INVOLVED

Gulf, Union and Edgington are petroleum refiners. They produce and sell a variety of petroleum products, including liquid asphalt. Union and Edgington produce liquid asphalt at refineries in California, which they sell in other western states (App. 72, 139). Gulf produces liquid asphalt at its Los Angeles refinery which it sells to Industrial, its wholly owned

subsidiary. Industrial apparently sells liquid asphalt purchased in California in other western states (App. 122–123). Union, Edgington, and Gulf are not directly engaged in the production of asphaltic concrete.

Copp, Industrial and Sully-Miller all produce asphaltic concrete (App. 51, 86–87, 117). Although the description of their business activities in the record and the opinions below is somewhat ambiguous, all three companies apparently are themselves paving contractors and also sell asphaltic concrete to other paving contractors (App. 51, 86–87, 117). Industrial also sells liquid asphalt (App. 122–123); Copp and Sully-Miller do not (App. 87).

Asphaltic concrete is produced at "hot plants" by combining liquid asphalt with aggregates and fillers at temperatures of approximately 375° F. It is delivered to the jobsites in dumptrucks and is placed at a temperature of about 275° F. The nature of the product limits deliveries to an area within about 35 miles of the hot plant (Pet. App. 3).

Copp operates one hot plant at Artesia, California, and its operations are largely confined to the Southern half of Los Angeles County (App. 53). Sully-Miller operates 11 hot plants in Los Angeles and Orange Counties (App. 90). Industrial apparently operates 55 hot plants in California, Arizona and Nevada (App. 180). Sully-Miller and Industrial both compete with Copp for asphaltic concrete business in the Los Angeles area (App. 87, 180).

The present location of the Copp and Sully-Miller hot plants precludes either company from delivering asphaltic concrete outside of the state of California

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(App. 53, 90). Although Industrial's Nevada hot plant is apparently located within 35 miles of the Nevada-Arizona border and may be capable of producing asphaltic concrete for delivery in California, Industrial has stated, apparently without contradiction: "At no time has any of the asphaltic concrete produced at any of the hot plants owned and operated by Industrial in either California, Arizona or Nevada been sold or shipped outside the states in which the plants were located" (App. 117).[1]

C. THE SECTIONS 3 AND 7 CLAYTON ACT CLAIMS INVOLVED

1. *The Section 3 Claims.* The questions before this Court with respect to claims under Section 3 of the Clayton Act are limited to claims based on alleged Section 3 violations by Industrial in connection with the sale of asphaltic concrete. Section 3 prohibits sales or leases "on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller * * *," which have anticompetitive effects. Paragraph 19(h) of the amended complaint alleges that the defendants "[t]hreatened actual and potential customers of plaintiffs that unless they refrained from purchasing asphaltic concrete from plaintiffs in plaintiffs' area of competition, that said customers would be unable to obtain supplies of asphaltic concrete at a competitive price in

[1] Industrial has acknowledged that it is engaged in interstate commerce in some of its operations (A. 118). It apparently purchases liquid asphalt in California which it resells in other states (A. 122–123).

other areas where said customers had no other source of supply other than defendants" (App. 20). This allegation apparently encompasses asphaltic concrete sales both in the Los Angeles area and at other unspecified locations, which were conditioned on the customers refraining from purchasing the product from Copp for use in the Los Angeles area.

2. *The Section 7 Claim.* Since the district court did not dismiss the respondents' claim based on the Gulf acquisition of Industrial, the only question before this Court with respect to Section 7 of the Clayton Act involves the allegation that Union violated that section by acquiring Sully-Miller. Section 7 prohibits certain acquisitions by a corporation "engaged in commerce" of the assets or stock "of another corporation engaged also in commerce * * *," which have anticompetitive effects.

D. THE OPINIONS BELOW

Neither the district court nor the court of appeals focused upon the specific language of Sections 3 and 7 of the Clayton Act defining the reach of the statute in relation to commerce. Instead, the district court concluded that the asphaltic concrete marketing activities of Industrial and Sully-Miller do not constitute commerce within the prohibition in Section 1 of the Sherman Act against conspiracies, combinations and contracts in restraint of "commerce" and then assumed that activities which do not constitute commerce under the Sherman Act similarly are not commerce under the Clayton Act. In reversing the dismissal of the Section 3 and Section 7 portions of the

complaint, the court of appeals noted that asphaltic concrete produced by Copp, Sully-Miller, and Industrial is used in the construction of interstate highways and held that "the production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law" (Pet. App. 10).

ARGUMENT

Introduction and Summary

Statutory language delineating the reach of legislation regulating commerce requires particularized analysis. The words "commerce," "in commerce," and "interstate commerce," do not have a fixed meaning uniformly applicable whenever such words appear in statutory provisions. Rather, this Court stated in *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 520–521:

> The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration.

The language, history and purpose of the Clayton Act demonstrate that in that Act Congress intended to exercise the full extent of its constitutional power to regulate commerce. Thus, the term "commerce" as used in that Act encompasses all activities properly

subject to federal regulation under the Commerce Power, *i.e.*, not only activities which are directly interstate in character but intrastate activities which have a substantial effect on interstate commerce.

The phrase "engaged in commerce," which appears in both Section 3 and Section 7, should be interpreted to mean engaged in commercial activities which are subject to congressional power. In the Sherman Act, Congress exercised to the utmost extent the federal power to regulate commerce. See *United States* v. *South-Eastern Underwriters Assoc.*, 322 U.S. 533. The draftsmen of the Clayton Act, who sought to extend the substantive prohibitions of the Sherman Act, did not intend the new legislation to have a narrower reach with respect to commerce than the earlier statute they were attempting to strengthen.

Although more recent cases, and some statutes, differentiate between activities which are in the flow of interstate commerce and intrastate activities which affect that commerce, that distinction should not be read into "engaged in commerce," which was used in the original Clayton Act in 1914. Nor should the meaning of this phrase in Section 7 be limited as a result of the 1950 amendments of that section. The 1950 Congress never focused on that phrase, and did not intend to constrict its meaning and scope.

Similarly, the phrase "in the course of such commerce" in Section 3 of the Clayton Act should be interpreted to mean in the course of activities which are subject to federal regulation. That interpretation is consistent with the purpose of and with past deci-

sions applying Section 3. The phrase was added to the statute to exclude coverage of activities which are not subject to federal regulation because they are inherently local and do not affect interstate commerce. Section 3 has been applied to prohibit exclusive dealing arrangements in connection with intrastate sales.

In Enacting The Clayton Act Congress Intended To Regulate Both Interstate Activities and Local Activities Having a Substantial Effect on Interstate Commerce

A. SECTION 7 APPLIES TO FIRMS ENGAGED IN LOCAL ACTIVITIES THAT SUBSTANTIALLY AFFECT COMMERCE

1. Section 7 of the Clayton Act prohibits mergers or acquisitions which may have anticompetitive effects where both the acquired and acquiring firms are "en-engaged in commerce". The meaning of the phrase "engaged in commerce" is primarily derived from the definition of "commerce" in the Clayton Act and its legislative history.

Section 1 of the Clayton Act defines "commerce" as follows:

> "Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.

This definition, which appeared in the original bill reported by the House Judiciary Committee in 1914,[2] used almost the precise words—"trade or commerce among the several States and with foreign nations"—which had been used in the Sherman Act.[3] It also broadened the definition to encompass commerce between insular possessions and territories. The legislative history of the Clayton Act confirms that by this broad definition of "commerce" Congress intended that the Clayton Act would reach all commerce to which the Sherman Act was applicable.

As the official title of the Clayton Act ("An Act to supplement existing laws against unlawful restraints and monopolies * * *," 38 Stat. 730) implies, Congress intended to extend the proscriptions of the antitrust laws to transactions and trade practices not covered by the Sherman Act. The Senate Report declared that the objective of the Act was (S. Rep. No. 698, 63d Cong., 2d Sess., 1):

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[2] The Senate added a proviso, "That nothing in this Act contained shall apply to the Philippine Islands." S. Rep. No. 698, 63d Cong., 2d Sess., 42–43. The definition section as amended has remained intact as 15 U.S.C. 12.

[3] Section 1 of the Sherman Act, 15 U.S.C. 1, declares that every contract, combination or conspiracy "in restraint of trade or commerce among the several States, or with foreign nations" is illegal, and Section 2, 15 U.S.C. 2, declares that persons who monopolize "any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

> * * * to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the [Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation. * * *

The arresting of the creation of trusts or monopolies in their incipiency was the fundamental principle underlying Section 8 of the Clayton bill (now Section 7 of the Act) and the House Report stated that that section was intended to eliminate the evil resulting from the aggregation of economic power through stock acquisitions "so far as it is possible to do so." See H. Rep. No. 627, 63d Cong., 2d Sess., 17.

This Court discussed the purposes of Section 7 as it read prior to the 1950 amendments in *United States* v. *E. I. DuPont De Nemours & Co.*, 353 U.S. 586, and observed (353 U.S. at 589):

> Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended.

The Clayton Act was a remedial statute designed to reach anticompetitive practices in their incipiency. It would have been anomalous for Congress to have sought to strengthen the antitrust laws by curing perceived deficiencies in the Sherman Act and at the same time to have restricted the jurisdictional scope of those remedial provisions. The Court of Appeals for the Third Circuit recognized this fact, in *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, certiorari denied, 346 U.S. 901, in holding that banking constituted "commerce" for purposes of the Clayton Act. Thus, the court stated (206 F. 2d at 166):

> We find nothing in the legislative history, however, to indicate that Congress did not intend by Section 7 to exercise its power under the commerce clause of the Constitution to the fullest extent. The avowed purpose of the Clayton Act was to supplement the Sherman Act, 15 U.S.C.A. §§ 1–7, 15 note, by arresting in their incipiency those acts and practices which might ripen into a violation of the latter act. Since the general language of the Sherman Act was designed by Congress "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements" the supplementary general language of the Clayton Act was undoubtedly intended to have the same all inclusive scope.

This conclusion is further supported by the 1950 amendments to the Clayton Act, which extended Section 7 to cover the acquisition of assets. Although the legislative history of the 1950 amendments did not deal directly with the "commerce" requirement, that

history reflects a continuing Congressional intent fully to exercise its regulatory powers.

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315–323, this Court reviewed the 1950 legislative history and found that "[t]he dominant theme pervading congressional consideration * * * was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Id.* at 315. In addition, the legislative history reflected congressional concern over the "desirability of retaining 'local control' over industry and the protection of small businesses." *Id.* at 315–316. Motivated by its concerns over increasing concentration, Congress sought to give "* * * courts the power to brake this force at its outset and before it gathered momentum." *Id.* at 317–318.

Acquisition of firms engaged in local activities may violate Section 7 if the effect of their acquisition may be substantially to lessen competition in relevant geographic and product markets. For example, a firm such as Union could obtain a virtual monopoly of an industry such as the asphaltic concrete industry, with significant interstate consequences, by acquiring one local firm after another across the country. Such a result would be contrary to the aim of Section 7, which was intended to block all acquisitions likely to contribute to increasing levels of concentration. As the House Report to the 1950 amendment stated:

> Acquisitions * * * have a cumulative effect, and control of the market * * * may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition * * *. [H. Rep. No. 1191, 81st Cong., 1st Sess., 8.]

2. In *United States* v. *South-Eastern Underwriters Assoc.*, 322 U.S. 533, this Court, in holding that the insurance business constituted "trade or commerce among the several states" under Section 1 of the Sherman Act, concluded (322 U.S. at 558) that "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements * * *."

Consistent with that view, the Sherman Act has been broadly applied to many local activities which nevertheless substantially affect interstate commerce. See, *e.g.*, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (agreement to fix price paid for California-grown sugar beets); *United States* v. *Frankfort Distilleries*, 324 U.S. 293 (agreement to fix local retail prices); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (local advertising agreements used to injure competitor in interstate competition). As this Court stated in *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464:

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not mat-

ter how local the operation which applies the squeeze.[4]

Since, as discussed earlier (pp. 11–12, *supra*), the Clayton Act was intended to supplement the Sherman Act by reaching anticompetitive practices before they matured into Sherman Act violations, Section 7 of the Clayton Act should also be construed as applying to firms engaged in local operations which substantially affect commerce. In attempting to strengthen the Sherman Act, Congress did not adopt a provision that had a lesser reach than the statute it was designed to bolster.

B. SECTION 3 APPLIES TO LOCAL TRANSACTIONS WHICH SUBSTANTIALLY AFFECT COMMERCE

The principles discussed above with respect to Section 7 are equally applicable to Section 3. As this

[4] *United States* v. *Yellow Cab Co.*, 332 U.S. 218, did not limit the Sherman Act to purely interstate activities. In that case this Court held that while a conspiracy among taxi cab companies to control the transportation of passengers between railroad stations in Chicago was within the reach of the Sherman Act (332 U.S. at 229), transportation of passengers to and from the stations to homes, offices, and hotels had only a "casual and incidental" relationship to interstate commerce (332 U.S. at 230–232). The Court noted that a traveler has complete freedom to arrange his transportation by several means of conveyance, of which taxi cab service is only one. The Court cautioned, however, that it was not "establish[ing] any absolute rule that local taxicab service to and from railroad stations is completely beyond the reach of federal power or even beyond the scope of the Sherman Act. * * * All that we hold here is that when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation" (332 U.S. at 232–233).

Court stated in *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, the Clayton Act was designed to supplement the Sherman Act and thus it "'* * * sought to reach the agreements embraced within its sphere in their incipiency, and in [Section 3] to determine their legality by specific tests of its own which declared illegal [transactions] * * * which may 'substantially lessen competition or tend to create a monopoly.'" 258 U.S. at 356.

Section 3 of the Clayton Act prohibits any person "engaged in commerce" from engaging in certain transactions "in the course of such commerce." The words "such commerce" refer to the commerce in which the person in question is "engaged". Indeed, the legislative history confirms that the phrase was intended to have precisely this meaning.

The House version of Section 3 did not contain the "in the course of such commerce" phrase; it simply prohibited certain transactions by persons "engaged in commerce." Although the phrase "in the course of such commerce" which the conference committee added was not extensively discussed in the reports or debates, the remarks of Senator Walsh indicate that it was added to Section 3 to make clear that the section applied only to transactions which Congress could constitutionally regulate. See 51 Cong. Rec. 16115.

Senator Walsh's concern presumably arose from this Court's 1908 decision in the *First Employers' Liability Cases*, 207 U.S. 463. The original Employers Liability Act, 34 Stat. 232, imposed liability upon every common carrier "engaged in trade or commerce" between states to *any* employee injured by

reason of the negligence of any of the carrier's officers, agents or employees. This Court held the Act invalid because imposing liability in favor of any employee "without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce." 207 U.S. at 498. Congress promptly enacted a new statute imposing liability upon such common carriers in favor of "any person suffering injury while he is employed by such carrier in such commerce." 35 Stat. 65. That statute was upheld in the *Second Employers' Liability Cases*, 223 U.S. 1.

Since the sole purpose of the "course of such commerce" limitation was to exclude transactions which are not subject to federal regulation, the phrase should not be interpreted to exclude transactions which are subject to that regulation. Accordingly, Section 3 of the Clayton Act is applicable to all tying arrangements and exclusive dealing contracts which substantially affect interstate commerce.[8]

C. THE PRINCIPLES OF *FEDERAL TRADE COMMISSION* V. *BUNTE BROS.*, 312 U.S. 349, ARE NOT APPLICABLE TO THE CLAYTON ACT

While petitioners concede that the commerce clause permits federal regulation of local activities substantially affecting interstate commerce, they contend, relying on *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, that Congress must use explicit language indicating an intent to regulate such activities. Since the Clayton Act does not contain language such as "affecting commerce," petitioners argue that it must be construed as applying only to interstate activities (Pet. Brief, p. 38).

In *Bunte Bros.*, this Court held that the words "in commerce" in Section 5 of the Federal Trade Commission Act did not encompass local activities which substantially affect commerce. The decision was based on two grounds: (1) a restrictive principle of statutory construction derived from an examination of the commerce provisions in legislation enacted between 1935 and 1940, and (2) the Commission's own restrictive construction of the Act, reflected in its unsuccessful attempt in 1935 to obtain legislation extending the Act to local activities affecting commerce. Neither rationale may properly be applied to the Clayton Act.

1. The principle of statutory construction adopted in *Bunte Bros.* is of doubtful validity in light of this Court's subsequent decision in *South-Eastern Underwriters, supra.* The principle was based upon and reflected a method of legislative drafting which embodied contemporaneous judicial decisions re-

[8] *Rosemound Sand and Gravel Co.* v. *Lambert Sand and Gravel Co.*, 469 F. 2d 416 (C.A. 5), does not support petitioners' contention that Section 3 is inapplicable to intrastate sales. Although the court of appeals stated that the absence of "interstate business" disposed of the Clayton and Robinson-Patman Act claims, the opinion does not describe the Clayton Act claims and does not analyze the relevant statutory language or legislative history. Moreover, in *Rosemound* the court held that the defendant's activities did not affect commerce under the Sherman Act. Thus, the opinion does not hold that transactions which are within the Sherman Act because they "affect commerce" are not "in the course of such commerce" for purposes of Section 3 of the Clayton Act.

strictively construing the reach of the commerce clause.[6] It assumes that the Congress which wrote the Clayton Act in 1914 intended to freeze the reach of that Act "within the mold of then current judicial decisions defining the commerce power." *South-Eastern Underwriters, supra,* 322 U.S. at 557. This proposition was rejected in *South-Eastern Underwriters* with respect to the 1890 Congress which adopted the Sherman Act. It must also be rejected as applied to the 1914 Congress which passed the Clayton Act—a statute that was intended to broaden the earlier legislation.

Although Congress' power to regulate intrastate rail rates was affirmed in the *Shreveport Rate Cases,* 234 U.S. 342, decided in 1914, it is uncertain whether that decision was viewed as of general application or as a specialized rule applicable only to the regulation of transportation.[7] Indeed, although *Bunte Bros.* refers

[6] The Court referred to the following provisions: The National Labor Relations Act, §§ 2(7), 9(c), 10(a), 29 U.S.C. 152(7), 159(c), 160(a), enacted in 1935; the Bituminous Coal Act, § 4–A, 15 U.S.C. (1940 ed.) 834, enacted in 1937; and a jurisdictional provision of the Federal Employers Liability Act, § 1, 45 U.S.C. 51, added in a 1939 amendment. It is likely that the drafting style used in these acts was a result of such decisions as *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, decided in 1935, which drew a sharp distinction between "flow of commerce" and "affecting commerce" jurisdiction.

[7] The significance of the *Shreveport Rate* decision was clouded by subsequent decisions such as *Hammer* v. *Dagenhart,* 247 U.S. 251, in which an act to prevent interstate commerce in the products of child labor was declared invalid on the ground that "* * * production of articles, intended for interstate commerce, is a matter of local regulation" (247 U.S. at 272). Although various decisions of this Court both before and after the *Shreveport Rate* case can be read as establishing

to the "Shreveport Doctrine" as being in existence in 1914, the Court declined to attribute it significance, noting that (312 U.S. at 353) "[t]ranslation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

Even, however, if it is assumed that the power to regulate local matters affecting commerce was recognized in 1914, there is no suggestion in the *Shreveport Rate Cases* or any other decision of the time that particular language was necessary to exercise that power. Neither the congressional debates with respect to enactment of the Clayton Act nor the judicial opinions of that period indicate any disposition to draw a sharp line between interstate commerce and local activities which affect interstate commerce. On the contrary, judges and legislators of that era tended to equate "commerce among the states" with all commerce which is subject to federal regulation.

In *Gibbons* v. *Ogden,* 9 Wheat. 1, Chief Justice Marshall said (9 Wheat. at 194): "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one." The commerce "which concerns more States than one" includes all commerce within a state which affects interstate commerce. This Court adhered to that definition when the Clayton Act was passed.

that the Commerce Clause extends to intrastate activities affecting interstate commerce, the issue was not definitely settled until the late 1930's and early 1940's in such decisions as *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, *United States* v. *Darby,* 312 U.S. 100, and *Wickard* v. *Filburn,* 317 U.S. 111.

In the *Second Employers' Liability Cases*, 223 U.S. 1, which was decided two years before the enactment of the Clayton Act, this Court said (*id.* at 46–47):

> The phrase "among the several States" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.

In the following year this Court said in the *Minnesota Rate Cases*, 230 U.S. 352, 398:

> The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States.

The draftsmen of the Clayton Act were presumably aware of those decisions and undoubtedly assumed that using the phrase "among the several States" in their definition of commerce would be sufficient to include all commerce *except* "that commerce which is confined within one State and does not affect other States."

2. The second ground underlying *Bunte Bros.*—the agency's own restrictive interpretation of the statute and its unsuccessful legislative attempt to broaden the Act—is inapplicable to the Clayton Act. Neither the Department of Justice nor the Federal Trade Commission has interpreted the Clayton Act as inapplicable to local transactions affecting commerce, and neither has sought amendatory or clarifying legislation dealing with the problem. The 1950 amendments, which dealt only with Section 7, did not focus on the commerce definition. Thus, contrary to petitioners' contention, those amendments cannot be read as reflecting a congressional intent that Section 7 be limited to interstate transactions (Pet. Brief, p. 38).[8]

Indeed, although the legislative history of the 1950 amendments contains no reference to the "engaged in commerce" phrase of Section 7, the discussion of the "any section of the country" language of that section is inconsistent with petitioners' contention. The Senate Report observed (S. Rep. No. 1775, 81st Cong., 2d Sess., 4):

> As the bill originally stood it was to be violated if, among other things, competition was substantially lessened "* * * in any community * * *" of the country. The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise in

[8] In any event, this Court's decision in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, casts considerable doubt on the continued validity of these factors in statutory construction. There this Court, in holding Section 7 of the Clayton Act applicable to bank mergers, rejected the argument that the passage of the Bank Merger Act of 1960 and enforcement policies of the Justice Department indicated that Section 7 did not reach bank mergers. With respect to the passage of the Bank Merger Act, this Court observed that (374 U.S. at 348–349) "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Although the Justice Department had at one time held the view that Section 7 did not reach bank mergers, this Court found that view to be a misunderstanding of the scope of Section

a small town from buying up another local enterprise in the same town. As a consequence, the word "community" was dropped from the subsequent versions of the bill.

Implicit in this analysis is the assumption that as originally drafted the bill covered such local mergers. If Congress had thought that the "engaged in commerce" language excluded mergers of local firms, there would have been no need to adopt the "section of the country" language in order to exclude mergers of minor impact. Therefore, to the extent that the 1950 Congress considered the "engaged in commerce" language, it must have assumed that it covered firms engaged in local activities which substantially affect interstate commerce. Any other assumption would have conflicted with the basic purposes of the 1950 amendments, which were designed to make Section 7 a more effective instrument for preventing anti-competitive mergers.

Finally, even assuming the validity of the explicit language principle of construction, *Bunte Bros.* recognizes that it is not an absolute requirement and that it should not be followed where "* * * the purpose of the Act would be defeated." 312 U.S. at 351. A restrictive interpretation of the Clayton Act "commerce" requirement would, as shown earlier (pp. 14–15, *supra*), frustrate the statutory purposes of the Act. Moreover, unlike Section 5 of the Federal Trade Commission Act, Sections 3 and 7 of the Clayton Act

7, and as such not binding on the Court (374 U.S. at 340). See also *United States* v. *DuPont Co.*, 353 U.S. 586, *supra*, where this Court rejected the Federal Trade Commission's view that Section 7 of the Clayton Act did not apply to vertical acquisitions.

embody "relatively precise" (312 U.S. at 353) prohibitions and their enforcement is qualified by the requirement that the effect of transactions encompassed by those sections "may be to substantially lessen competition, or to tend to create a monopoly." Thus, the application of Sections 3 and 7 to local transactions substantially affecting commerce would not give a "* * * federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local laws" (312 U.S. at 354).

CONCLUSION

For the foregoing reasons, Sections 3 and 7 of the Clayton Act should be interpreted to apply to firms engaged in local activities which substantially affect interstate commerce.

Respectfully submitted.

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In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,
Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Reply of Petitioners to Brief of the United States as Amicus Curiae

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply of Petitioners to Brief of the United States as Amicus Curiae

On Saturday, October 12, 1974, we received through the mail in the form of corrected page proof a "Brief for the United States as Amicus Curiae". We think this to be untimely under the Court's Rule 42(2), for respondents' brief was due on August 9, 1974, and filed about August 9, and the oral argument is scheduled for October 21. This late filing deprives us of adequate time to reply.

The government does not discuss the questions on which the Writ was granted and does not seek to sustain the reasoning on which the court below rested its decision. The government's

argument is that the terms "engaged in commerce" and "in the course of such commerce" in Sections 3 and 7 of the Clayton Act are the equivalent of "affect commerce" and thus concurrent with the reach of the Sherman Act.

But the government confines itself to Sections 3 and 7 of the Clayton Act *and noticeably avoids applying the argument about the Robinson-Patman Act.** Yet the terms "engaged in commerce" and "in the course of such commerce" are identical in Section 3, in Robinson-Patman, and in Section 2 of Clayton, of which Robinson-Patman is an amendment. As Sections 2 and 3 were enacted at the same time, in 1914, the commerce provisions have the same meaning. We quote them side by side:

Sec. 2. (38 Stat. 730; 15 USCA, sec. 13.)

That it shall be unlawful for *any person engaged in commerce, in the course of such commerce,* either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce:*

Sec. 3. (38 Stat. 731; 15 USCA, sec. 14.)

That it shall be unlawful *for any person engaged in commerce, in the course of such commerce,* to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser

All emphasis in quotations is added.

*The Robinson-Patman Act is not a favorite of the Antitrust Division of the Department of Justice.

thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, *where the effect of such lease,* sale, or contract for sale or such condition, agreement or understanding *may be to substantially lessen competition or tend to create a monopoly in any line of commerce."*

Not only are the terms in Sections 2 and 3 the same, but each adds another requirement, that the "effect * * * may be substantially to lessen competition or tend to create a monopoly in any line of commerce." If the words "engaged in commerce" and "in the course of commerce" in Section 3 meant what the government contends, they would be pure surplusage, for they would already be totally encompassed in the "effect" clause.

Furthermore, if the terms "engaged in commerce" and "in the course of such commerce" mean what the government now claims, the lengthy discussion about Section 3 in *Standard Oil Company of California v. United States,* 337 U.S. 293 (1949) would have been unnecessary.

The 1950 amendments to Section 7 of the Clayton Act made no change in the commerce provisions of Section 7, and they ran *pari passu* with Sections 2 and 3, viz.:

"Sec. 7. (38 Stat. 731; 15 USCA, sec. 18.)

"That no corporation *engaged in commerce* shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation *engaged also in commerce, where the effect* of such acquisition *may be to substantially lessen competition* between the corporation whose stock is so acquired and the corporation making the acquisition, *or to restrain such commerce* in any section or community, or tend to create a monopoly *of any line of commerce."*

Here again, if the words "engaged in commerce" meant what the government now asserts, they were surplusage for they would have already been contained in the "effect" clauses and certainly in the words "to restrain commerce" which read like the Sherman Act.

These sections cannot rationally be read in any way other than as requiring (1) *not only* that the activities substantially affect or restrain interstate commerce, *but also* (2) that they or the parties be "engaged in commerce". The government's new revelation of what these sections mean not only rewrites them but deletes from them the significant terms entirely.

The other arguments of the government are similar to some made in respondents' brief. With the limited time for reply, we adopt as further reply the discussion at pp. 8 through 20 of the "Reply Brief for Petitioners Union Oil Company of California and Industrial Asphalt, Inc.," filed on October 5, 1974. Inasmuch as respondents applied to the Robinson-Patman Act the same arguments that the government applies only to Sections 3 and 7 of the Clayton Act, a major portion of the discussion we adopt is to be found in the discussion in our reply brief above of the Robinson-Patman Act.

CONCLUSION

We respectfully submit that Sections 3 and 7 of the Clayton Act cannot bear the interpretation the government's amicus brief would force upon them.

Dated: San Francisco, California, October 15, 1974.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1012

GULF OIL CORPORATION, *et al.*,

Petitioners,

vs.

COPP PAVING COMPANY, INC., *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Motion for Leave to File a Brief Amicus Curiae on Behalf of American Building Maintenance Industries; Motion for Permission to File Said Brief Late; and Brief Amicus Curiae.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Motion for Leave to File a Brief Amicus Curiae on Behalf of American Building Maintenance Industries; Motion for Permission to File Said Brief Late.

The undersigned on behalf of American Building Maintenance Industries moves the Court:

1. For leave to file the attached brief as amicus curiae and

2. Permission to file said brief on or before October 21, 1974, notwithstanding its late filing.

On Tuesday, October 15, 1974, the undersigned received from the Department of Justice the brief for the United States as amicus curiae herein. Therein, the United States showed that its purpose in filing the brief was to affect the outcome of its appeal in *United States*

v. American Building Maintenance Industries. Only by the filing of an amicus curiae brief on its own behalf may American Building Maintenance Industries respond to the arguments of the United States asserted in its amicus curiae brief. Because the United States elected to file its brief at such a late date, it has not been possible for American Building Maintenance Industries to prepare its attached response for filing earlier than October 21, 1974.

The Gulf Oil case is scheduled for argument on October 21, 1974.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974
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Brief for American Building Maintenance Industries as Amicus Curiae.

Opinions Below.

The Court of Appeals' opinion (Pet. App. B) is reported at 487 F.2d 202 (9 Cir. 1973), and the opinion of the District Court (Pet. App. A) is not officially reported.

Jurisdiction.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and upon the petition for a writ of certiorari filed on December 28, 1973, and granted on March 25, 1974.

Statutes Involved.

The pertinent statutory provisions involved are set forth at pages three to five of the petitioners' brief on the merits.

Questions Presented.

By way of answer to the amicus curiae brief of the United States, American Building Maintenance Industries ("ABMI") responds to the following:

> Whether the acquisition of the stock of a corporation not "engaged also in commerce" may be subject to the prohibitions of Section 7 of the Clayton Act.

Interest of ABMI.

ABMI is appellee in the case of *United States of America v. American Building Maintenance Industries*, No. 73-1689, now pending before the Court on appellee's motion to affirm the judgment of the United States District Court for the Central District of California. The judgment of the District Court dismissed the Government's action under Section 7 of the Clayton Act attacking ABMI's acquisition of certain janitorial service corporations. The District Court found, *inter alia*, that such acquisitions were not of corporations "engaged also in commerce" as required by Section 7 of the Clayton Act because the acquired corporations rendred janitorial services solely within a single state, using for that purpose labor obtained in that state and supplies purchased in that state.

On October 15, 1974 ABMI received from the Department of Justice a copy of the brief of the United States as amicus curiae in this, the Gulf Oil case. The avowed purpose of the brief of the United States is to affect the outcome of its appeal in *United States v. American Building Maintenance Industries*. This Brief for American Building Maintenance Industries as Amicus Curiae is ABMI's sole opportunity to respond to the amicus curiae brief of the United States. Argument in the Gulf Oil case is set for October 21, 1974.

ARGUMENT.

For the purpose of protecting its interest in *United States v. American Building Maintenance Industries* and affecting the decision therein, the United States at the eleventh hour has filed its amicus curiae brief in this action. To serve this purpose the Government relies upon its assertion that in enacting the Clayton Act "Congress intended to exercise the full extent of its constitutional power to regulate commerce." This assertion is patently erroneous. Section 7 of the Clayton Act, both as enacted in 1914 and as reenacted in 1950, applied its prohibitions only to corporations. No acquisition by a natural person, regardless of the extent of his operations, and regardless of the extent or effect of his acquisition is subject to its prohibitions.

In 1914 when Section 7 was initially enacted it moreover did not purport to "exercise the full extent" of congressional power since it applied only to the acquisition of stock. In 1950 when this limitation was eliminated by extending its prohibition also to the acquisition of assets, the limitation of its application only to corporations was continued.

Moreover, in the enactment of Section 7 in 1914 and its reenactment in 1950 Congress explicitly provided that its prohibitions applied only to a corporation "engaged in commerce" whose transaction was with another corporation "engaged also in commerce." Had Congress intended the result urged by the Government here, it would not have provided that both the acquiring corporation and the acquired corporation must be "engaged in commerce." If Congress had intended in Section 7 to exercise "the full extent of its constitutional power" it would have provided that *any*

acquisition by anyone, regardless of the local character of the person or entity from whom the stock or assets were acquired, would be subject to the Section 7 prohibitions if "any line of commerce" was detrimentally affected. Certainly under the Government's premise here Congress had in 1914 and again in 1950 the power to regulate any such acquisition regardless of the activities of the person or entity on the other side of the transaction. But Congress did not do so.

All of this is made even more clear when Section 7 of the Clayton Act is compared with Sections 1 and 2 of the Sherman Act. Section 1 of the Sherman Act explicitly covers "*Every* contract, combination in the form of trust or otherwise, or conspiracy. . . ." Section 2 of the Sherman Act explicitly covers "*Every* person who shall monopolize, or attempt to monopolize . . ." This all inclusive language in the Sherman Act was the basis for this Court's decision in *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944) on which the Government places principal reliance. There the court found that interstate insurance business was subject to the Sherman Act as follows:

> "We come then to the contention, earnestly pressed upon us by appellees, that Congress did not intend in the Sherman Act to exercise its power over the interstate insurance trade.
>
> "Certainly the Act's language affords no basis for this contention. Declared illegal in § 1 is 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . .'; and 'every person' who shall make such a contract or engage in such a combination or conspiracy is deemed guilty of a misdemeanor. Section 2 is not less sweeping. 'Every person' who monopolizes, or attempts to monopolize, or conspires with 'any other person' to monopolize, 'any part of the trade or commerce among the several States' is, likewise, deemed guilty of a misdemeanor. Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." (322 U.S. at 553).

By contrast the language of Section 7 mandates a much narrower coverage:

> "No corporation *engaged in commerce* shall acquire * * * the stock * * * of another corporation *engaged also in commerce*, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." (15 U.S.C. §18, emphasis added).

The all inclusive provisions of the Sherman Act were before Congress when it enacted Section 7 in 1914 and when the section was reenacted in 1950. Congress, however, elected to use the severely restricted provisions of Section 7.

The Government indulges in a bootstrap operation. It relies upon Sherman Act cases to avoid the plain language of Section 7 of the Clayton Act and seeks to

apply Sherman Act decisions to this case and to *United States v. American Building Maintenance Industries* without any meaningful reference to the facts. Even in applying one Sherman Act case to another:

> "[T]his court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in light of their facts and of a clear recognition of the essential differences in the facts of those cases and in the facts of any new case to which the rule of earlier decisions is to be applied." *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 562, 579 (1925).

That principle is more than ever applicable where the effort is to apply Sherman Act cases to a Clayton Act claim.

Conclusion.

It is respectfully submitted that ABMI's motion to affirm in No. 73-1689 should be granted. In any event, the Government's case against ABMI should be judged only in that proceeding with adequate opportunity for presentation of issues therein.

Respectfully submitted,

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